Winners Chapel International Nairobi t/a Kingdom Heritage Model School v Nyaoko (Employment and Labour Relations Appeal 8 of 2020) [2024] KEELRC 13612 (KLR) (18 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13612 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL 8 OF 2020

JW KELI, J

DECEMBER 18, 2024

BETWEEN

WINNERS CHAPEL INTERNATIONAL NAIROBI T/A KINGDOM HERITAGE MODEL SCHOOL ..... APPELLANT

AND

ANDREW MANGI NYAOKO ..... RESPONDENT

(Being appeal from the judgment delivered in Nairobi CMMC NO. 395 OF 2018 on the 10th January 2020 before Hon A.N. Makau PM)

JUDGMENT

1. The Appellant herein being dissatisfied with the Judgment of Hon. A. N. Makau, PM, dated January 10, 2020 filed Memorandum of Appeal dated May 30, 2023 seeking that the Appeal be allowed, the judgment of the Trial Magistrate Court be set-aside and the Respondent's suit be dismissed with costs.

Grounds of the appeal

2. That the Learned Trial Magistrate erred in law and in fact in failing to uphold the Appellant's contention that the Appellant as named was not an entity that was capable of being sued as such.
3. That the Leaned Trial Magistrate erred in law and in fact in dismissing the Appellant's evidence to the effect that the Respondent absconded from duty and had left children he was driving stranded.
4. That the Learned Trial Magistrate erred in law and in fact in holding that the Respondent was unlawfully terminated from employment.
5. That the Learned Trial Magistrate erred in law and in fact in awarding the Respondent a claim for leave when the Respondent was not entitled to the same in the circumstances of the case.

6. That the Learned Trial Magistrate erred in law and in fact in awarding the Respondent the sum of Kshs. 300,000/= being twelve (12) months' salary as compensation for unfair termination without taking into account the circumstances of the case.

7. That the Learned Magistrate erred in law and in fact in awarding the Respondent the sum of Kshs. 22,750/= purporting the same to be service gratuity despite having held that the same was not payable.

8. That the learned Trial Magistrate erred in law and in fact in awarding the Respondent the sum of Kshs. 133,333/= purporting that the same was uncontested when in fact the Appellant contested the same and the Respondent did not prove entitlement thereof.

9. That the Learned Trial Magistrate erred in wholly dismissing the Appellant's evidence, submissions and authorities tendered and further erred in entering judgment for the Appellant with costs.

Back ground to the Appeal

10. The Respondent instituted a Claim against the Appellant in the Magistrate Court via a Statement of Claim dated 19th October 2018 seeking a total of Kshs 594,083.33/= broken down as follows:

    i. Unpaid June Salary Kshs 25,000/=

    ii. 1 month salary in lieu of Notice Kshs 25,000/=

    iii. Leave days (25,000 × 1.3yrs) Kshs 22,750/=

    iv. House Allowance(25,000 × 15/100 ×1.3 × 12) Kshs 58,500/=

    v. Unfair dismissal (25,000 × 12) Kshs 300,000/=

11. The Appellant/ Respondent opposed the claim through its Defence to Statement of Claim dated 26th March 2019 which the Respondent answered with his Response dated 27th March 2019.

12. The Respondent/claimant relied on his List of Documents dated 19th October 2018, Witness Statement of Mr. Andrew Mangi Nyaoko of even date, his testimony during trial and his Written Submissions dated 18th October 2019.

13. The Appellant/Respondent on the other hand placed reliance on its List of Documents dated 11th April 2019, Witness Statement of Mr Mwanyalo Fulgence Lenjo of even date, his testimony during trial and its Written Submissions dated 28th November 2019.

14. The Trial Magistrate Court entered Judgment in favour of the Respondent on 10th January 2020 as follows:-

    i. One month salary in lieu of notice Kshs 25,000/=

    ii. Unpaid leave days Kshs 22,750/=

    iii. Unfair dismissal Kshs 300,000/=

    iv. Service gratuity Kshs 22,750/=

    v. Unpaid overtime Kshs 133,333/=

    vi. Certificate of service.

    vii. Costs of the suit.

Written Submissions

15. The appeal was canvassed by way of written submissions. The appellant's written submissions drawn by Lutta & Company Advocates were dated 21st June 2023. The respondent's written submissions drawn by Lemmy Regau & Company Advocates were dated 16th October 2023.

Determination

16. The appellant submits that this being a first appeal, it is trite law, that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court is by way of retrial. See the Court of Appeal's decision in Gitobu Imanyara & 2 Others -Vs- Attorney General [2016] e KLR.

17. The Respondent submits that this is the first Appellate Court and relied on the decision in Abok James Odera t/a AI Odera & Associates v John Patrick Machira t/a Machira eKLR, where the Court of Appeal stated as follows with regard to the duty of the first appellate court;

    'This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

18. The Court upheld the cited authorities by the parties on the role of the court on first appeal.

Issues for determination

19. The appellant in written submissions identified the following issues for determination:-

    i. Whether the Appellant was properly sued in the trial court?

    ii. Whether the Respondent was entitled to the reliefs granted?

    iii. Whether the Learned Trial Magistrate erred in disregarding the Appellant's evidence of the Respondent having absconded duty?

    iv. What is the duty of the Appellate court?

20. The respondent in written submissions identified the following issues:-

    (i) The Learned Magistrate erred in law and fact in failing to uphold the Appellant's contention that the Appellant as named was not an entity that was capable of being sued as such.

    (ii) The Learned Magistrate erred in law and fact in dismissing the Appellant's evidence to the effect that the Respondent absconded from duty.

    (iii) The Learned Magistrate erred in law and in fact and misdirected himself in finding that the Respondent was unfairly terminated.

    (iv) The learned Magistrate erred in law and in fact in awarding the reliefs of 72 months compensation, gratuity and overtime.

21. The court having noted the issues addressed by the parties in written submissions and taking into account the grounds of appeal was of the considered opinion that the issues placed by the parties for determination in the appeal were as follows:-

    a. Whether the appellant was properly sued before the trial court.

b. Whether the Respondent's employment was unfairly terminated or he absconded work.

c. Whether to uphold the reliefs granted to the respondent.

Whether the appellant was properly sued before the trial court

22. The appellant asserts that they submitted before the trial court that the Appellant is a church registered under the *Societies Act* Cap 108 of the Laws of Kenya. As an unincorporated entity, the Appellant is devoid of the legal capacity to sue and be sued in its own name [See para 4 Appellant's Written Submissions dated 28th November 2019 at pgs 50-51 Record Of Appeal (hereinafter "ROA")]. The Appellant cited the decision in National Bank of Kenya Ltd -VS- Christian Community Life Church [2020] eKLR, where Justice Mabeya held as follows regarding capacity of unincorporated bodies to sue and be sued in their own names:-

> " The respondent did not deny that it was a church registered under the *Societies Act* Cap 108 of the Laws of Kenya. It is common knowledge that, entities registered under the said Act are not legal entities that can sue or be sued in their own name. They are but unincorporated entities They can only sue or be sued in the names of their officials."

23. The Appellant further relied in the case of Living Water International v. City Council of Nairobi [2008] eKLR, where the Court held:-

> " A reading of section 3 of the *Societies Act* Cap 108 Laws of Kenya as well as the case law on the subject goes to show, that a religious society has no legal capacity to sue, and to be sued. This being the case, the plaintiff/applicant had no capacity to not only present the interim application, but the main suit as well. Both processes are therefore a nullity and proper candidates for striking out and are accordingly struck out". Further in the case of Kituo Cha Sheria v John Ndirangu Kariuki & Another [2013] eKLR, where it was observed that: -
>
> > "As a general rule, unincorporated legal persons including societies, clubs and business-names can only bring proceedings through their registered or elected officials or in their proprietor's names." In David Kamau Njoroge (Deceased) v. Savings and Loan (K) Ltd [2006] eKLR, the Court held:-
> >
> > > "It is now trite law that a suit instituted by a person who has no capacity or locus to institute it, is a non-suit such a suit is null and void from the beginning". The Appellant submitted that from the foregoing, it was clear that the trial Court was in serious error when it held that the issue for the locus standi of the respondent had not arisen. The issue was live before the court and it should have risen to the occasion by making a determination thereon. The Appellant further invited the Court to find that the trial court was in serious error and that its holding cannot stand in this respect.

24. The respondent on the issue submitted that the issue of joinder of parties did not arise at the lower court. That if the Appellant felt that it did not have the capacity to be sued, its ought to have raised it first as a preliminary objection or pleaded the same on their defence. The Appellant did not do so. That further, at paragraph 2 of the Appellant's defence at the trial court, the Appellant admitted the description of parties as given in the statement of claim. That the Appellant did not plead the issue of capacity. The Appellant also had not provided in the Record of Appeal, their list of issues. (The

typed proceedings of the lower court can be found from pages 23 -3 7 of the Record of appeal). That the issue of capacity did not arise during the hearing at the lower court. The 1st time, the issue of capacity arose is when the Appellant raised it on its submissions as a preliminary issue at the lower court. That Submissions do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions as was held by Mwera, J (as he then was) in Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007 that :- "Submissions simply concretise and focus on each side's case with a view to win the court's decision that way. Submissions are not evidence on which a case is decided." That the same judge in Nancy Wambui Catheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993 expressed himself as follows:- "Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court's view, are a course by which counsel or able litigants focus the court's attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case." The Respondent further relied on the decision by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014) eKLR:- "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

25. The Respondent further submitted that with respect to issues pleaded and framed, the Court had this to state in Hafid Maalim Ibrahim v Economic Freedom Party & 3 others [20181 eKLR

> ‘’In my view, even if the parties counsel had filed agreed issues, the trial court was not necessarily bound to go by the framed issues, as in my understanding, issues arise from the pleadings, evidence and the law. Thus depending on the nature of the pleadings, the evidence tendered, and the law applicable, the court may either go by the issues agreed or add or reduce them, provided it addresses the issues in contest or which arise from the pleadings and evidence. In the present case I agree that the judgement is brief. However, I have not been told of any specific issue raised in pleadings and evidence, which the trial court failed to address, or any issue that was not an issue that the trial court considered. In my view therefore, the learned magistrate was entitled to frame issues in the judgment. That dispenses of the first limb." The Respondent relying on the foregoing authorities submitted that the Appellant did not raise the issue of capacity in pleadings and evidence at the lower court. Therefore, the Appellant cannot introduce an issue that was not pleaded and evidence tendered at the lower court as a ground of appeal before this Honourable Court. This ground of appeal must therefore fail.

Decision on issue 1.

26. The court perused the defence to statement of claim dated 26th March 2019 (pages 14-15 of the record) and the witness statement Mwanyalo Lenjo and found that issue of whether the appellant had been sued properly before the trial court was not raised. I do agree with the position that submissions are not pleadings. The court upholds the decision of Court of Appeal in Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014) eKLR:-"Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable

to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

27. The Court holds that the issue of the Appellant's capacity to be sued having not been raised in defence and during the trial, it cannot be an issue at appeal stage where the role of the Court at first appeal from trial Court is guided by the settled law that it must reconsider the evidence, re-evaluate the evidence itself, and draw its own conclusions bearing in mind it has neither seen or heard the witnesses and should make allowance for that fact. See Selle & Another v Associated Motor Boat Co. Ltd & Others (1948) EA123.

28. The Court further holds that no prejudice was suffered by the Appellant being sued having admitted employer-employee relationship in its pleadings and participated in the hearing.

29. The ground of appeal is dismissed.

Whether the Respondent's employment was unfairly terminated or absconded work

Appellant's submissions

30. The Appellant submitted that the Learned Trial Magistrate in downplaying the testimony of the Appellant's witness found as follows:-

> " the Claimant stated to have been called over the phone and told to go to work in July. It is noted by the court that the school headteacher had left employment to pursue pastoral work and another head teacher had taken over...he is accused of absconding job without any reasonable cause, but i find the Respondent's witness lacked full facts of the alleged absconding. He talked of a report by the previous headteacher which report was not availed as evidence in support of the allegation the claimant absconded job. The witness by the Respondent was not involved in the running of the school's affairs and was not therefore a competent witness..." That the trial court applied very strict standards, applicable in a criminal trial in the employment court where evidence is received from any credible witness. That the evidence of their witness Mwanyalo Lenjo was credible (Page 9 of 12).

31. The Appellant further submits that the trial court erred in disregarding the Appellant's secondary evidence having already found that the school headteacher had left employment to pursue pastoral work and another had taken over. The resigned headteacher's whereabouts could not be ascertained without subjecting the parties to an unreasonable delay of the proceedings at the trial court effectively justifying admission of the Appellant's secondary evidence. That although the report detailing absconding of duty by the Respondent was not availed, its contents were corroborated by the Memo of 23rd November 2018 (See Appellant's List of Documents dated 11th April 2019) and the Appellant Witness' testimony. The Appellant submits that its witness was privy to the issues in contest herein by virtue of the office he held at the Appellant.. The Appellant submits that the testimony of its Witness was competent by virtue of section 33 of the *Evidence Act* on Admissibility of documentary evidence as to facts in issue that provides:-"(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—

(a) if the maker of the statement either—

(i) had personal knowledge of the matters dealt with by the statement; or

(ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and

(b) if the maker of the statement is called as a witness in the proceedings:

Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable."

32. The Appellant further, submits that section 66 of the *Evidence Act* Cap 80 Laws of Kenya that justifies admission of the Memo of 23rd November 2018 defines Secondary evidence to include:-

" 66. Secondary evidence.

Secondary evidence includes—

(a) ...;

(b) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies;

(c) copies made from or compared with the original;

(d) counterparts of documents as against the parties who did not execute them;

(e) oral accounts of the contents of a document given by some person who has himself seen it."

33. The Appellant invited the Court to find that the Appellant's witness's testimony at the trial court was competent, admissible, relevant and therefore was erroneously disregarded.

Respondent's submissions

34. The Respondent submitted that the law on desertion of employment is well settled. In Ronald Nyambu Daudi v Tornado Carriers Limited [2019] the Employment Court stated as follows:- ''Desertion of duty is a grave administrative offence, which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration (see Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited [2016] eKLR)." Further in Boniface Nkubi Karagania v Protective Custody Limited [20191 eKLR the Court elaborated as follows with respect to desertion:-

''The Claimant was accused of desertion and whereas this is a ground for dismissal or sufficient to demonstrate there was no unfair dismissal, the Respondent failed to

produce any evidence that the Claimant deserted duty. It was only averred in the Respondent's defence which remained mere allegations as the correspondence alluded to by the Respondent demonstrating the absence of intention to resume work was not produced in evidence. Desertion necessarily entails the employee's intention no longer to return to work. The employer would have to establish this intention in a fair process. Desertion requires an employee to infer an intention on the part of the employees, as a result of such employee's conduct, that the employee simply has no intention to return to work. The intent to discontinue employment must be shown by clear proof that it was deliberate and unjustified and because abandonment is a matter of intention and cannot merely be presumed from certain equivocal acts, it must be demonstrated. It cannot be argued that the fact that an employee simply disappeared from their workplace, they are guilty of abandonment. The absence must be accompanied by overt acts pointing to the fact that the employee simply does not want to work anymore and the burden of proof for the unjustified refusal to go to work rests on the employer. There was no better way of discharging this burden than showing the Claimant returned his uniform and failed to return to work at the new station.''

35. The Respondent contended that in light of the above decisions, the Appellant needed to provide evidence of the following in order to prove desertion or the Respondent absconded duty;-

    a. That the Respondent had no intention to no longer return to work.

    b. That the Appellant had used all the available channels to reach out to the Respondent.

    c. That they had put the Respondent on notice that termination of employment on that ground was under consideration.

    d. lastly and imperatively, the Appellant did not show that he had lodged a complaint at the labour office that the Claimant had deserted employment. nIn the absence of the above, then it cannot be said that the Respondent deserted employment. Therefore on a balance of probabilities, it is manifest that the Claimant was terminated.

36. The Respondent further submitted that the Appellant's witness at the lower Court was not the Administrator of the School whereby the Respondent had been employed. He also further indicated that he was only relying on the report prepared by the former head teacher. The Report was not produced in the lower Court. The Appellant's witness did not witness the facts relevant to this case and also did not provide the trial court with the report of the former Head teacher. His evidence was not direct evidence therefore inadmissible and the trial court correctly pointed out this in the impugned judgment. That it is trite law that hearsay evidence is not admissible in court. In Benjamin Mwenda Muketha suing as the legal representative of Mercy Nkirote v Abdikadir Sheik & 2 others [20181 eKLR Majanja J had this to say on admissibility of hearsay or evidence which is not direct;-

> ''Was liability proved in these circumstances" Sections 107, 108 and 109 of the *Evidence Act* (Chapter 80 of the Laws of Kenya) place the burden of proof of a fact on the person who wishes the court to believe in the existence of such fact. It was the duty of the appellant to prove liability on the balance of probabilities. This proof must, of course, be through admissible evidence. PW 1 did not witness the evidence and only heard about the accident through a radio broadcast. The evidence of how the deceased died in an accident was therefore hearsay testimony which could not be used to prove the truth of the assertions made by PW 1. Apart from the-fact that the accident took place, the testimony of PW 1 and PW 2 as to how the accident could have occurred was not direct testimony as required

by section 63 of the *Evidence Act* (Chapter 80 of the Laws of Kenya). In other words it was hearsay evidence. It matters not that the deceased was pushed or jumped. In either case, the testimony of both witnesses on this issue was inadmissible and not based on any fact. Since, there was no evidence on how the accident occurred, I find and hold that the appellant failed to prove negligence against the respondents on the balance of probabilities. I would, like the trial magistrate, dismiss the suit for want of proof." Therefore, the Appellant had no evidence of the Respondent absconding duty. The Appellant also did not pass the test set in law for him to allege that the Claimant and the ground of appeal must fail.

Decision on issue 2

37. The burden of proof applicable to prove of reasons for termination as valid (section 43 of the *Employment Act*) is as provided in section 47(5) of the *Employment Act* to wit:- ''(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.';

38. The Appellant relied on the ground of absconding work on which the Trial court held:- ''the Claimant stated to have been called over the phone and told to go to work in July. It is noted by the court that the school Headteacher had left employment to pursue pastoral work and another Headteacher had taken over...he is accused of absconding job without any reasonable cause, but i find the Respondent's witness lacked full facts of the alleged absconding. He talked of a report by the previous Headteacher which report was not availed as evidence in support of the allegation the claimant absconded job. The witness by the Respondent was not involved in the running of the school's affairs and was not therefore a competent witness... the claimant did not have any issue with the school or employer to abscond and if there was nay issue the same has not been brought to the court attention. He had worked or a year plus without complaint and there is no sufficient reason for him to have absconded duty. He was unlawful and unfairly terminated from employment''(Page 6 of the record).

39. During the trial the claimant told the court that on 4th June 2018 he was told not to go to work and that the school would use UBER. On asking if he could go back to work he was told they had hired another driver. During cross-examination, RW told the court he was not the school administrator but church administrator. That the school had a board. He was told the claimant was unreachable, he did not have information why and how the claimant left work. He did not know who brought back the phone allocated to the Claimant.

40. The court having re-evaluated the evidence including the memo (D-exh 1) agreed that the witness as held by the trial court was not credible. There was no reason given why the author of the Memo was not called as a witness. The memo's author alleged to have called the claimant but no evidence of the said call logs were attached to the Memo. The evidence of RW1 thus amounted to hearsay. RW1 told the court he did not know how and why the claimant left work. The claimant had served for 1 year plus and a notice to show cause was not issued. I uphold the decision in Simon Mbithi Mbane v Inter Security Services Limited [2018] KEELRC 2234 (KLR) that:- ''8. An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. 'Further to add such an employee ought to be issued with notice to show cause why his services could not be terminated through last known contact. That was not done.'' Consequently, I find no basis to disturb the decision of the trial court which had further benefit of hearing the witnesses. The holding of unlawful and unfair termination is upheld.

Whether to uphold the reliefs granted to the respondent.

41. The trial court granted the respondent the following reliefs:-

    i. One month salary in lieu of notice Kshs 25,000/=.

    ii. Unpaid leave days Kshs 22,750/=.

    iii. Unfair dismissal Kshs 300,000/=

    iv. Service Gratuity Kshs. 22,750/-

    v. Unpaid Overtime Kshs. 133333.

Decisions on issue 3

One-month salary in lieu of notice Kshs 25,000/=.

42. The court on first appeal having upheld the holding of unfair termination of the Respondent's service upholds the notice pay award under section 36 and 49(1)(a) of the *Employment Act*.

Unpaid leave days Kshs 22,750/=.

43. The Respondent submits that incidentally; the trial court erroneously lists service gratuity instead of leave days at paragraph 26 of the impugned judgment. The Respondent submitted that the role of this court as the first Appellate court cannot be overemphasized and invited the court to look at the impugned judgment and rectify this error. The appellant admitted to this award of unpaid leave days Kshs 22,750, in the alternative, in submissions, and the same is upheld.

Unfair dismissal Kshs. 300,000/=

44. The appellant invited the Court to consider the fact that the Respondent had only worked with the Appellant for a paltry period of about 16 months at the time of the separation. That the Respondent also largely engineered his termination by electing to return his official phone when the Appellant sought to get him back to work, a transgression that warrants summary dismissal. Upon termination, the Respondent further failed to take measures to mitigate his loss despite the fact that he could secure alternative employment. The Appellant reiterates its submissions at the trial court that the award of the maximum of 12- months compensation was excessive in the circumstances and also in comparison to other awards inter alia in Joseph Omollo -VS- Board Management Kisumu Boys High School [2016] eKLR and Mary Nekesa Wanyonyi -vs- Navin Shah [2017] eKLR (See para 18-19 Appellant's Written Submissions dated 28th November 2019 at pages 55-56 Record of Appeal).

45. The Appellant relied on the provisions of Section 49 of the *Employment Act* No 11 of 2007 which provides as follows regarding the criteria for grant of the 12-months' compensation:- "49. Remedies for wrongful dismissal and unfair termination

    (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following —

        ...

        (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

...

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

...

(k) any conduct of the employee which to any extent caused or contributed to the termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination..."

46. It was the Appellant's submission that the Respondent, by his conduct, of absconding from work and sending someone else to deliver his official phone other than himself (evidence of guilt) heavily contributed to the termination and section 49 (4) (b) above should be applied. The Appellant invites this court to re-evaluate the evidence and come to this finding.

47. The respondent submitted that once the trial court made the adverse finding that the Respondent was unlawfully terminated, then it had to award the Respondent compensation pursuant to section 49 (1) (c) of the *Employment Act*, 2007. Under that section, the trial court had the discretion to award compensation up to a maximum of 12 months. The court in its discretion awarded 12 months. That the Appellant had not demonstrated in any way why this Honourable court should disturb the award/ discretion of the lower court. That this ground of appeal should fail.

Decision

48. The exercise of discretion under section 49(1)(c) of the *Employment Act* on the award of compensation for unfair termination is to be exercised taking into account the factors stated under section 49(4) of the Act. The award of compensation for unfair termination is not a whimsical or capricious exercise of discretion. The Court finds that the Trial Court in its judgment did not disclose whether it applied the criteria under section 49(4) of the *Employment Act* to justify the award of maximum compensation to the Respondent.

49. The court on first appeal then must apply the criteria under section 49(4) of the *Employment Act* in re-evaluation of the compensation. In terms of length of service, the Respondent had served February 2017 to June 2018. That was approximately 16 months of service (page 10 paragraph 4 of the statement of claim). He was a driver and it was not demonstrated that there would be difficulty in securing another job or if he was still unemployed. The court finds that the award of a maximum 12 months' salary for length of work of 16 months excessive and unjustified. The court sets aside the said award and in place, awards compensation of 6 months' salary taking into consideration the length of service and likelihood

of securing similar job and the fact that the termination was unlawful. The award of Kshs. 300000 is set aside and substituted with award of equivalent 6 months' salary at 25000 total sum of Kshs. 150,000/-

iv. Service gratuity Kshs 22,750/=

50. The Respondent submitted this was a typing error. The court finds the award falls under the unpaid leave and is set aside as a correction of the Judgment of the Trial Court.

v. Unpaid overtime Kshs 133,333/=

51. The appellant submits that the Kshs 133,333/= awarded as unpaid overtime be withdrawn as the same is not payable for not having been proven. This being a court of first appeal, in re-evaluating the evidence on record can clearly note that the Appellant being a school, the Respondent would stay away from work during the school holidays and any overtime worked (though not proved) is compensated by the leave during the school holidays.

52. The trial court in judgment stated that the Respondent worked extra hours daily and this was not contested. The Respondent in his witness statement stated he worked 12 hours daily. The Appellant in witness's statement of Mwanyalo Lenjo did not inform the court on the hours of work of the respondent. There was no evidence that this being a private school with mixed church business the claimant was on leave during school holidays. Submissions are not evidence and that was not pleaded in the defence witness statement. I find no basis to disturb the award of overtime by the trial court.

vi. Certificate of service.

53. The certificate of service is due to the Respondent under section 51 of the *Employment Act* to wit:- ''Certificate of service

    1. An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks.'' It is upheld.

vii. Costs of the suit-

54. Costs follow the event. The claim was successful and the winner was awarded due costs.

Conclusion

55. The appeal is held as partially successful. The judgment and Decree delivered in Nairobi CMMC No. 395 of 2018 between the parties on the 10th January 2020 before Hon A.N. Makau P.M. is set aside and in place substituted as follows:-

    Judgment is entered in favour of the claimant against the respondent as follows:-

    a. Payment in lieu of Notice Kshs. 25000

    b. Unpaid leave days Kshs 22750

    c. Compensation for unfair termination Kshs. 150000

    d. Unpaid overtime Kshs. 133333

    (Total award of Kshs. 330,833 payable subject to statutory deduction of PAYE only)

e. Costs of the claim to the claimant and interest at court rate from the date of judgment until payment in full,

56. In the partially successful appeal, the court orders each party to bear their own costs

57. It is so Ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 18th DAY OF DECEMBER, 2024.

JEMIMAH KELI,

JUDGE.

In the Presence of:

Court Assistant: Caleb

Appellant : - Moga h/b Lutta

Respondent: Nyawadi

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