



**St John’s Hospital Limited v Irungu (Civil Appeal E058 of 2020)
[2024] KEELRC 13437 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13437 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E058 OF 2020
BOM MANANI, J
DECEMBER 16, 2024**

BETWEEN

THE ST JOHN’S HOSPITAL LIMITED APPELLANT

AND

SAMUEL NYAGA IRUNGU RESPONDENT

JUDGMENT

Background

1. Following the termination of the Respondent’s contract of service by the Appellant, he instituted CMEL Cause No. 65 of 2019 before the Chief Magistrate’s Court, Nairobi through which he sought to challenge the validity of the decision. He prayed for the following orders:-
 - a. A declaration that the decision to terminate his employment was unlawful and unfair.
 - b. Compensation for unfair termination of employment to a maximum of twelve months wages.
 - c. One month’s salary in lieu of notice to terminate his contract of service.
 - d. Service pay for twelve years.
 - e. Damages for unfair and unlawful termination of his contract of service and diminished employability.
 - f. Cost of the suit.
 - g. Interest on the amounts claimed at 14% per annum from the date of the court’s judgment.
 - h. Certificate of service.
 - i. Any other relief which the court deemed fit to grant.



2. The Appellant entered appearance and filed a defense. It, inter alia, pleaded that it had paid the Respondent salary in lieu of notice in terms of sections 35 and 36 of the *Employment Act*. As such, termination of his employment was valid in law.
3. The case proceeded to trial and both parties called witnesses in support of their respective positions. Thereafter, the trial court delivered its verdict on 6th December 2019.
4. In the decision, the court found for the Respondent. It issued the following orders:-
 - a. A declaration that the Appellant's decision to terminate the Respondent's contract of service was unlawful and unfair.
 - b. The Appellant to pay the Respondent one month's salary in lieu of notice, that is to say Ksh. 30,200.00.
 - c. The Appellant to pay the Respondent compensation for unfair termination of the latter's contract totaling Ksh. 362,400.00.
 - d. The Appellant to pay the Respondent service pay in the sum of Ksh. 87,115.38.
 - e. The Appellant to pay costs of the case and interest at court rates from the date of the decision.
5. Being dissatisfied with the decision and having not filed an appeal against it, the Appellant filed an application to review the decision dated 28th January 2020. Its contention was inter alia that:-
 - a. There was an error in the decision which required correction.
 - b. There were sufficient reasons to justify the request to review the decision.
6. The grounds in support of the application were that the court had erroneously awarded the Respondent pay in lieu of notice since the record reflected that this amount had in fact been paid before suit was filed and the Respondent confirmed receipt thereof. As such and in the face of this evidence, it was erroneous for the court to have awarded the same amount.
7. The Appellant also argued that the Respondent was enrolled with the National Social Security Fund (the NSSF). As such and by virtue of section 35 of the *Employment Act*, he was not entitled to claim service pay. Therefore, it was erroneous for the court to have awarded him service pay.
8. The application was opposed. According to the Respondent, the matters which the Appellant was alluding to in the motion were suitable for appeal and not review. As such, the application was tantamount to inviting the trial court to sit on appeal on its own decision.
9. The court delivered its ruling on 28th August 2020 dismissing the request for review. In the court's view, the matters which the Appellant had raised in the motion were fit for appeal and not review.
10. Unhappy with the decision, the Appellant filed the instant appeal. The Memorandum of Appeal raises four grounds of appeal. It is contended that the trial court: failed to give the application for review proper consideration; failed to consider critical matters that were raised in the application; failed to apply the principles governing review of decisions; and erred in holding that the application for review lacked merit.

Analysis

11. I have considered the rival submissions in the appeal. The record shows that the Respondent's prayer for salary in lieu of notice in the Statement of Claim was expressly contested by the Appellant. It was



- the Appellant's case that this relief was not available to the Respondent since he was paid this amount before his contract was terminated.
12. The Appellant presented to the trial court a copy of the payment voucher dated 15th October 2018 to demonstrate that indeed the Respondent had been paid salary in lieu of notice. The document appears at page 61 of the Record of Appeal and is listed as number eight (8) in the Appellant's list and bundle of documents before the trial court appearing at page 30 of the Record of Appeal.
 13. During the trial, the Respondent confirmed that he was indeed paid salary in lieu of notice (see page 79 of the Record of Appeal). Further, the Appellant's witness confirmed that the Respondent was paid in lieu of notice (see pages 79 and 80 of the Record of Appeal).
 14. The Appellant having provided proof of payment of salary in lieu of notice and the Respondent having confirmed receipt of this amount, the relief for pay in lieu of notice was no longer available to the Respondent. Indeed, this explains why the Respondent's lawyers made no reference to it in their final submissions to the trial court (see pages 39 to 46 of the Record of Appeal).
 15. With the record clearly demonstrating that the Appellant had paid the Respondent pay in lieu of notice, what can explain the trial court's decision to award this relief? A perusal of the trial court's decision shows that the magistrate did not explain the basis for her decision. There is simply no attempt to justify why the relief was ordered despite evidence that it had been settled before institution of the case.
 16. I cannot find any explanation for the court's action except that it was in error. It is not fathomable that the court would order a party to do that which has already been done.
 17. However, even if the award was not ordered out of error, it is plain that it was incongruous to have granted it. As such and in my humble view, this provided sufficient reason for the trial court to review its decision to correct the absurdity.
 18. As such, I am satisfied that the court failed to appreciate its obligation to review the decision in this respect. Much as this was a suitable ground for appeal, it was patently a ground for review.
 19. The other matter which the Appellant raises relates to the order to pay service charge. As indicated earlier, it is the Appellant's case that since the Respondent was registered under the NSSF, he was disqualified by section 35 of the *Employment Act* from seeking service pay.
 20. It is correct that the law excludes employees who are beneficiaries of the social security provided by the NSSF from pursuing service pay. However, whether one is a beneficiary of the NSSF scheme is a matter of fact which must be established through evidence to enable the court decline to order payment of service pay.
 21. The record shows that the Respondent prayed for service pay at paragraph 19 of the Memorandum of Claim. In response, the Appellant made a general denial of the paragraph through paragraph 14 of its Statement of Defense. There was no specific plea that the Respondent was disqualified from pursuing service pay because he was enrolled with the NSSF. At the very least, one would have expected the Appellant to have specifically contested this claim along the aforesaid lines in the same way it contested the claim for pay in lieu of notice.
 22. The record further shows that the Appellant did not present the Respondent's NSSF statement during the trial to demonstrate that indeed he was a member of the NSSF and that it (the Appellant) had been making remittances to the said body on his behalf. Indeed, no such statement was included in the Appellant's list of documents before the trial court.



23. The fact that the Appellant was contesting the Respondent's entitlement to service pay because of the latter's membership with the NSSF was raised for the first time during cross examination of the Respondent (see page 79 of the Record of Appeal). Although the Respondent conceded that he was under the NSSF scheme, he stated that he was not sure if the Appellant had been making remittances to the said scheme on his behalf as required by law.
24. Faced with this state of affairs, the trial court ordered the Appellant to pay the Respondent service pay. In my view, the court proceeded on the premise that the Appellant had not demonstrated that the Respondent was an active member of the NSSF in so far as his contributions to the scheme was concerned.
25. Being the party that had contested the Respondent's entitlement to service pay on account of his enrollment with the NSSF, the burden rested on the Appellant to lay before the trial court evidence to establish the fact that the Respondent was an active member of the NSSF and that it (the Appellant) was remitting contributions to the said agency on his behalf. This obligation is founded on sections 107, 108 and 109 of the Evidence Act. As the record shows, this was not done.
26. After judgment was delivered, the Appellant sought to introduce the NSSF statements appearing at pages 62 and 63 of the Record of Appeal for the very first time through its affidavit dated 28th January 2020 (see pages 56 and 57 of the Record of Appeal). The Respondent's NSSF statements are maintained by the NSSF. As such and being the party that was making NSSF remittances on behalf of the Respondent, the Appellant had the power to apply for these statements beforehand. In effect, it was within its (the Appellant's) power to have procured and produced the statements in evidence during the trial. It did not. Consequently, it was not open to it to seek to introduce the records at the stage of the application for review.
27. I am therefore in agreement with the trial magistrate that the request to review her judgment with regard to service pay was not well founded. It was not anchored on any of the grounds that would justify an application for review.
28. If the Appellant wished to challenge the order on service pay, it should have filed an appeal and applied to present additional evidence relating to the Respondent's NSSF statements. However, it was not open to it to sneak the evidence onto the court's record at the stage of review. As such, I decline to reverse the decision refusing to review the order to pay service pay.
29. As I pen off, it is perhaps important to address a matter which the Respondent's counsel has flagged and which goes to the competence of the instant appeal. Counsel argues that because the Appellant opted to file an application for review against the trial court's judgment, it lost the right to appeal. As such, this appeal is incompetent.
30. I think that counsel has conflated two distinct matters. It is true that a party who has sought review of a decision cannot pursue and appeal in respect of the same decision. As such, it was not open to the Appellant, having filed the application for review against the trial court's judgment, to file an appeal against the said judgment. However, it was open for him to pursue an appeal from the decision on the application for review. These two are entirely distinct issues.
31. Indeed Order 43 (1) (x) of the Civil Procedure Rules indicates that an appeal lies as of right from a decision on an application for review under Order 45 of the same rules. It is noted that the application in the instant action was premised on, inter alia, Order 45 of the Civil Procedure Rules. As such, the Appellant was entitled, as a matter of right, to challenge the decision emanating from the said application by way of an appeal. Consequently, the Respondent's objection in this respect is without merit.



Determination

32. In the ultimate, I make the following orders:-

- a. The appeal partially succeeds to the extent that the decision by the trial court declining to review the order that the Appellant pays the Respondent salary in lieu of notice is set aside.
- b. In place thereof, I order that the decision of the trial court directing the Appellant to pay the Respondent Ksh. 30,200.00 in lieu of notice be and is hereby set aside.
- c. Accordingly, the trial court's judgment dated 6th December 2019 is hereby reviewed and varied to the extent that the order that the Appellant pays the Respondent the sum of Ksh. 30,200.00 is expunged therefrom.
- d. The order by the trial court refusing to set aside its decision with respect to service pay is upheld with the consequence that the order requiring the Appellant to pay the Respondent the sum of Ksh. 87,115.38 as service pay is sustained.
- e. Each party shall bear own costs in the appeal.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF DECEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

