



**Aqiq Trading Limited v Nyakundi (Appeal E143 of 2023)
[2024] KEELRC 13466 (KLR) (11 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13466 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E143 OF 2023
K OCHARO, J
DECEMBER 11, 2024**

BETWEEN

AQIQ TRADING LIMITED APPELLANT

AND

JONES NYAKUNDI RESPONDENT

(Being an Appeal from the Judgment of Honourable D. O. MBEJA. (Mr) Principal Magistrate on 24th November 2023 in Mombasa MCELRC No. 513 of 2021)

JUDGMENT

Introduction

1. The Appellant filed the appeal herein through a Memorandum of Appeal dated 15th December 2023 raising 18 grounds against the Judgment of the Learned Principal Magistrate. The grounds which I must say are over split revolve around three principal issues;
 - I. Whether the Learned Trial Magistrate erred in law and fact when he held that the Respondent's employment was unfairly terminated.
 - II. Whether the Learned Trial Magistrate erred in law and fact when he awarded the Respondent the reliefs he did.
 - III. Whether the Learned Trial Magistrate failed to consider the Appellant's evidence and submissions to the prejudice of its case.
2. On the grounds of appeal, the Appellant prayed for orders that:
 - a. This Appeal be allowed and the Learned Trial Magistrate's Judgment, be set aside in its entirety.
 - b. That the Respondent's claim be dismissed.



- c. The costs of the claim be awarded to the Appellant.

Respondent's case before the Lower Court.

3. Through a memorandum of claim dated 8 August 2021, the Respondent initiated a claim before the lower court, contending that at all material times, he was an employee of the Appellant as a storeman whose employment the latter terminated unfairly on 3 May 2020.
4. In the claim the Respondent further contended that the termination, was not procedural as the Appellant did not serve him with any notice of intention to terminate his employment and, was destitute of genuine and reasonable reasons.
5. The Respondent asserted that upon the unfair termination of his employment, he was entitled to, but the Appellant neglected and or refused to pay him;
 - I. 2 months' salary in lieu of notice.....KSHS. 40,000.
 - II. House allowance of 15% of his salary.....KSHS. 18,000.
 - III. Service pay KSHS. 1000 per dayx15 days x 6years...KSHS. 90,000.
 - IV. Compensation for unfair termination.....KSHS. 240,000.
 - V. Certificate of service.
 - VI. Costs and interest.

The Appellant's Case Before the Lower Court.

6. The Appellant presented one witness, Ms. Emma Kwamboka Arisi, its Human Resources Manager, to testify to support its defence against the Respondent's case. She adopted her witness statement dated 15 October 2021 as her evidence in chief.
7. The Witness stated that the Respondent was employed by the on 1st July 2016 on a fixed-term contract which was renewed yearly until 30th June 2020 when his final contract lapsed.
8. The witness stated that the last contract was to come to an end on 30th June 2016 by effluxion of time, and through a letter of the same date, the Appellant informed him that the contract was not going to be renewed.
9. The Respondent was paid all his terminal dues as well as an additional one month's salary gratuitously. The Respondent acknowledged receipt of the payment. He was issued with a certificate of service which he picked from the Appellant's offices on 15th July 2020.
10. The witness maintained that the Respondent's contract of employment wasn't terminated as alleged but came to termination by effluxion of time.
11. It was further stated that at all material times, the Appellant remitted contributions on the Respondent's NSSF account as and when the same fell due for remittance.

The Judgment by the Lower Court.

12. After hearing the parties on their respective cases, the Learned Trial Magistrate delivered his judgement on 24th November 2023, wherein he found in favour of the Respondent and awarded him all the reliefs that he had sought in his Memorandum of Claim hereinabove mentioned.



The Appeal

13. Aggrieved by the Judgment, the Appellant filed the instant appeal assailing the same based on the over split grounds set out in his memorandum of appeal herein filed.

Analysis and Determination

14. This being a first Appeal, this Court is obliged to re-evaluate the material that was placed before the trial Court and come to its own independent findings and conclusions. This position was elaborately set out in the case of *Selle -vs- Associated Motor Boat Co.* [1968] EA 123; see also (*Abdul Hameed Saif vs. Ali Mohamed Sholan* [1955] 22 E. A. C. A. 270) where the Court held: -

“An appeal to this Court from a trial by the High Court is by the way of 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 demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.

15. It is with this lens that I shall interrogate the Appellant’s appeal herein. In my view, the appeal shall justly be determined by considering the following broad areas; the Learned Trial Magistrate’s finding on the manner the separation occurred; how the Learned Trial Magistrate considered the evidence before him; and the reliefs awarded.
16. Well identified and crafted issues for determination will often act as beacons guiding the court in rendering an organized and just judgement without wandering. Issues for determination shall normally flow from the parties’ pleadings, evidence and, submissions if made. It becomes imperative therefore that keen attention be given to the same when a judgment is being prepared.
17. I have carefully considered the whole of the Judgment by the Learned Magistrate, and find no challenge to conclude that he didn’t properly and sufficiently identify and craft issues for determination in respect of the matter before him. This as a result of inter alia, as will come out shortly hereinafter, a failure on his part to consider the material that was placed before him wholly.
18. The Appellant’s case before the Learned Magistrate was that the Respondent’s employment under which he was serving the Appellant immediately before the separation, was a fixed term contract which came to an end on 30th June 2020 by effluxion of time. On the other hand, the Respondent charged that his employment was terminated and that the termination suffered destituteness in procedural and substantive fairness. It was, therefore, imperative in my view, for the Learned Magistrate to make the manner how the separation occurred a vital issue for determination. A determination on the issue then could inform the Trial Court’s determination on whether there was a termination of the contract of employment as was alleged by the Respondent or not, and the reliefs awardable if any to the Respondent. Unfortunately, the Learned Magistrate didn’t identify this pivotal issue and interrogate it.
19. I have carefully considered the employment contract dated 1st July 2019. Clause 14 thereof provided “Contract period. This contract is valid for 12 months w.e.f 1st July 2019- 30th July 2020. Clause 10, which provided for termination of the contract states, “This agreement shall automatically end on the



last date below as per clause 14. However, within the period of this contract, either party is entitled to terminate the agreement by giving the other a one month's notice in written or equivalent in lieu of notice. This is without prejudice company's right to terminate this agreement summarily for any lawful cause."

20. I note that the evidence placed by the Respondent before the Trial Court didn't not in any manner discount the Appellant's position that at the material time, the Respondent was serving under a fixed term contract which had an appointed lapse date, 30th June 2020. Further, his deafening silence on the written contract and its clauses hereinabove mentioned.
21. Considering the foregoing premises, I come to the inevitable conclusion that the separation occurred when the contract dated 1st July 2019 lapsed by effluxion of time. The Learned Magistrate erred, therefore, by holding that the Respondent's employment was terminated by the Appellant.
22. The Respondent argued before the Trial Court, and the Court in my view, erroneously got persuaded by the argument, that the Respondent's employment was terminated by the Appellant without notice and a hearing. Where a contract of employment is in nature a fixed term one, with an appointed date of lapse, issuance of a termination notice will only be a requirement if the same is being terminated for one reason or the other before the appointed lapse date.
23. Counsel for the Appellant submitted before this Court that indeed a termination notice was a requirement under clause 10 of the employment contract. This in my view, is with great respect a deliberately twisted position. The clause is unambiguous. The notice could only be required if either party was desirous of terminating the contract before the appointed date of lapse. That is why the parties deliberately used the phrase "within the Contract period".
24. Immense effort was made by the Respondent in his submissions before this Court, aimed at convincing me that the Learned Magistrate was right in holding that the provisions of section 41 of the Employment Act were applicable in the matter before him and that the termination of his employment was procedurally unfair. I hold that in the circumstances of the matter, section 41 wasn't applicable. The principle of procedural fairness wasn't either.
25. I take a clear view that where a contract of employment has lapsed by effluxion of time, a claim for unfair termination cannot succeed unless it is anchored on a postulation that there was a legitimate expectation for renewal of the contract. Additionally, the stipulations of sections 43, and 45 of the Act do not come into play, at all.
26. In the upshot, I conclude that the Learned Magistrate erred in law and fact when he held that the Respondent's employment was unfairly terminated.
27. Having held as I have hereinabove, I do not hesitate to conclude that the Respondent wasn't and isn't entitled to the compensatory relief contemplated under section 49[1][c] of the Employment Act for an employee who successfully assails his or her employer's decision to terminate his or her employment.
28. The Respondent was awarded unpaid house allowance when the Magistrate blanketly allowed his claim, 'as prayed'. Clause 8 of the employment contract provides;

"Entitlements

You will be accorded the following;

I. Salary and Allowances

Consolidated Gross salary [inclusive of all allowances] of KSHS. 15, 609....."



With this contractual stipulation, I find considerable difficulty in understanding what the basis for granting the award under the head, unpaid house allowance, by the Magistrate, was.

29. By allowing the Respondent's Claim in the manner he did, the Learned Trial Magistrate awarded the Respondent two months' salary in lieu of notice. Having found that in the circumstances of the matter issuance of a termination notice wasn't relevant, I hold that the award was erroneously made.
30. The Appellant asserted that it remitted contributions to the Respondent's NSSF account at all material times without failure. The Respondent didn't contradict this. Under section 35[5] of the [Employment Act](#), he, therefore, fell under the category of those employees excluded from pursuing enjoyment of and or enjoying the benefit of service pay.
31. By reason of the foregoing premises, I find the appeal herein meritorious. It is hereby allowed. The Learned Trial Magistrate's Judgment in the above stated claim is set aside and hereby substituted with an order dismissing the claim.
32. Orders accordingly.

READ, DELIVERED AND SIGNED THIS 11TH DAY OF December 2024.

OCHARO KEBIRA.

JUDGE

In the presence of:

Ms. Nafula for the Appellant

Mr. Maundu for the Respondent

