



REPUBLIC OF KENYA



Victonel Academy v Njuguna (Employment and Labour Relations Appeal E13 of 2021) [2023] KEELRC 137 (KLR) (26 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 137 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E13 OF 2021**

**HS WASILWA, J
JANUARY 26, 2023**

BETWEEN

VICTONEL ACADEMY APPELLANT

AND

JOHN NJUGUNA RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of the Chief Magistrates Court at Nakuru, honourable L Arika, in Nakuru CMC ELRC no 348 of 2019 delivered on November 22, 2021 where the respondent herein was the claimant and the appellant was the respondent. The grounds of the appeal are as follows:-
 1. The learned trial magistrate erred both in law and in fact by disregarding the respondent's oral and documentary evidence to favour the respondent.
 2. The learned magistrate erred in law and in fact by finding that the claimant was unfairly terminated when the appellant herein had duly followed the legal process before termination.
 3. The learned trial magistrate erred both in law and in fact by finding that the claimant was terminated unfairly when the claimant had clearly breached the terms of his employment contract.
 4. The learned trial Magistrate erred in law and in fact by failing to note that the claimant was served with a notice to show cause which he received but refused to sign.
 5. The learned magistrate erred in law and in fact by failing to acknowledge the fact that the respondent herein was invited for a disciplinary hearing which he failed to attend.
 6. The learned magistrate erred in law and in fact by failing to note that the respondent would habitually fail to sign documents availed to him by the appellant for example the termination



letter which he had clearly received but failed to sign and further annexed the same to his list of documents confirming that he had indeed received.

7. The learned magistrate erred in law and in fact in selectively reading the evidence and coming to a conclusion that the respondent worked overtime for the entire period worked for the appellant herein hence arriving to a wrong conclusion of awarding overtime.
 8. The learned magistrate erred in law and in fact by awarding overtime for the entire period of employment while the respondent had admitted in court that he never worked in the months of April, August, part of November and December plus public holidays every year when schools would be closed.
 9. The learned magistrate erred in law and in fact in awarding excessive compensation of 12 months salary when it is clear that the respondent herein had been lawfully terminated.
 10. The learned magistrate erred in law and in fact by awarding underpayment in the wrong category while from the evidence it is clear that the respondent herein was a driver of a van not a bus driver as pleaded and the salaries of the two differ hence the court arrived at a wrong conclusion.
 11. The learned magistrate erred in law and in fact by failing to note that the claimant had been served with a notice to show cause why disciplinary action should not be taken against him which he received but failed to respond.
2. The appellant sought for the following orders:-
- a. This appeal be allowed.
 - b. The judgement by honourable L. Arika delivered on November 22, 2021 and the decree thereof be set aside.
 - c. Costs to be awarded to the appellant.

Brief facts.

3. The respondent herein was employed by the appellant on January 10, 2015 to the position of a driver earning a cumulative salary of Kshs 10,420 which salary was raised to Kshs 15,692 in August, 2016 and earned till his termination on December 7, 2016. It is stated that the claimant reported to work each day at 6am and clocked out at 6pm everyday of the week from Monday to Saturday with Sunday granted as his rest day.
4. The circumstances leading to his termination is that he was served with a termination letter on the December 7, 2016 which letter was not preceded by a notice or disciplinary hearing. He averred that he raised the issue with his Union, Kenya National Union of Private School Teachers, who reported the issue to the labour office in Nakuru. However despite summoning the parties to discuss the issues surrounding the termination, the parties did not agree and the labour officer filed a certificate of disagreement dated November 17, 2017 leading to the filing of the claim at the lower court. The respondent maintained throughout that he was unfairly terminated and sought for the orders in the trial court.
5. The appellant on the other hand denied unfairly terminating the respondent and maintained that the respondent was terminated for gross misconduct as he drove the vehicle assigned to him so carelessly that the parents withdrew their children from the school transport which caused the appellant losses. In its defence dated May 18, 2020, the appellant admitted to employing the claimant on January 10,



2015 in the terms indicated in the employment contract at a salary which was mutually agreed upon by the parties. It is averred that the Respondent was summoned to attend a disciplinary hearing which he ignored despite being made aware of the charges levelled against him and the requirement to respond to the said notice. Upon termination that the Respondent was served with termination letter dated December 7, 2016, which indicated the notice period. On the relief sought, the appellant averred that the salary was negotiated and agreed upon. On overtime pay, it was averred that the respondent never worked for any overtime, on days worked the appellant stated that the respondent was paid his salary up until the date of termination and on compensation and costs it was averred that they are not warranted in the circumstances because the termination was as a result of gross misconduct.

6. This appeal proceeded by way of written submissions with the respondent filed on December 6, 2022, However the appellant had not filed any submissions at the time of writing this judgement.

Respondent's Submissions.

7. The respondent conceded the grounds of appeal and submitted them in two fold; whether the trial court erred in finding the respondent was unfairly terminated and whether the trial court was right to award the reliefs sought in the claim.
8. The respondent submitted from the onset that even though this is a first appeal and the court is mandated to re-evaluate the entire case and evidence before making a decision, it should refrain from making adverse finding unless compelled that no evidence was tendered or that the trial court misunderstood the evidence to arrive at unsupportable conclusion. In this he cited the case of *Musera v Mwechelesi and another* [2007] KLR 159.
9. On the first issue, it was submitted that the trial court made a sound decision in awarding the respondent 12 months compensation because the respondent failed to follow due process before terminating the services of the respondent. It was argued that the alleged notice to show cause is dated October 30, 2019 and the hearing was scheduled on November 6, 2019, long after the claimant was fired, therefore that the process was an afterthought. Further that the reason for termination of driving recklessly and causing pupils to withdraw from the transport system was not substantiated or backed up with any evidence informing the decision of the trial court to find the appellant to have unfairly terminated him.
10. On overtime pay, the respondent submitted that the record of appeal at page 106 and 115 shows instances where the respondent arrived at his workplace at 5:45 am and left at 6:30 pm in the evening, working overtime which time was not factored in his pay. It was also argued that even when the claimant had time in between picking and dropping students he was the appellant employee and therefore should have been paid overtime for working past 8 hours in a day. Thus the finding of the trial court on overtime was well reasoned.
11. On underpayment, the respondent submitted that he was employed as a driver of a medium sized vehicle (a bus) which fact was admitted by the appellant in his defence at the trial court and therefore he was underpaid in the circumstances.
12. The respondent also argued that he worked for some few days in December, 2016 which had not been paid informing the decision of the court to award the same. The respondent argued that the respondent did not seek any leave or public holidays pay in his claim and the appeal on those heads should fail.
13. I have examined the averments of the parties and the submissions filed herein.
14. This being a 1st appeal to this court, this court is indeed obligated to reevaluate the evidence afresh.



15. From the evidence submitted by the claimant in the lower court, he was employed by the respondents vide an employment agreement signed on January 10, 2015.
16. On November 7, 2016, the claimants services were terminated on account of negligent driving.
17. The letter indicated that he failed to exercise due care by carelessly and recklessly driving, over speeding and being involved in severe accidents putting pupils' lives in danger and resulting to significant withdrawal from school transport, 38 pupils initially to the current 23 pupils in KCA 709W.
18. The claimant denied any negligence on his part. The respondents had averred that the claimant was summoned for a disciplinary hearing as per this Exh. 4 and also served with a NTSC before the disciplinary hearing.
19. The claimant denied being served with any NTSC nor any invite to attend to a disciplinary hearing. The NTSC is a letter dated November 30, 2019 addressed to PO Box Nakuru.
20. It does not bear any address and neither is it signed by the claimant.
21. There is no evidence that it was served upon the claimants and if not why on the circumstances leading to it not being served.
22. The respondent appellants also never exhibited any letter to show that the claimant was invited to a disciplinary hearing.
23. The NTSC is actually dated 2019 when the claimant had already been dismissed and so cannot be in respect of this claim.
24. My understanding and the evidence above is that the claimant was terminated without being given an opportunity to be heard.
25. The validity of reasons leading to his termination have also not been established as no evidence which may have included police records on dangerous driving or charges thereto were not exhibited in court.
26. In view of this evidence and in terms of section 45 (2) of the Employment Act, it is my finding that the trial magistrate applied her mind correctly to the evidence before he arrived at the conclusion that the claimant Respondent herein was terminated unfairly and unjustly.
27. In terms of the remedies in the lower court, the appellants submitted that they were erroneously granted. They aver that the salary paid to the claimant was mutually agreed upon.
28. The agreement of employment between the claimant and respondent dated January 1, 2015 indicated that his salary was 10,420/= all inclusive of all benefits (including house allowance).
29. The claimant signed acceding to the said payment. The amount was below the statutory minimum. It is true that the claimant agreed to the contract.
30. The court cannot impute its meaning in a contract. However, courts cannot shy away from an illegality and cannot advance an illegality of paying an employee below the minimum wages order even if the employee signs agreeing to it.
31. In CA No. 55/2016, Five Forty Aviation Ltd vs Erwan Lanoë the Court of Appeal in applying Kenya Airways Limited versus Satwant Singh Flora, set out guidelines which determines rights and obligations of parties where one pleads illegality of a contract and making justification not be bond by it as follows;-



- (i) No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.
 - (ii) If the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.
 - (iii) No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the court ought not to assist him.”
 - (iv) No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.
 - (v) In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge that illegal performance and participation in it by the other party to the contract.”
32. In applying the law as laid above by the Court of Appeal, I note that in the agreement signed between the claimant and respondent, the respondent even decided that tax will be paid directly by the employee which is an obligation placed upon the respondent to deduct and remit taxes.
33. In my view, the agreement was oppressive and an illegality which the trial magistrate considered. She was able to find that the claimant has been underpaid and so awarded her the underpayments as particularized based on the legal notices on remuneratin.
34. The other awards or overtime were granted based on the attendance register and so was compensation for the unfair termination which the trial court exercised its discretion to award.
35. I see no reason to interfere with the judgment of the trial magistrate. I find that the trial court exercised her mind correctly to the facts and to the law and I find the appeal is not merited.
36. I dismiss this appeal accordingly with costs to the Respondents.

DATED, SIGNED AND DELIVERED IN OPEN COURT THIS 26TH DAY OF JANUARY, 2023.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Opar for Respondent – present

Nyaga holding brief for Mwangi for Appellant – present

Court Assistant - Fred

