Gituamba Stones Limited v Omondi (Employment and Labour Relations Appeal E150 of 2021) [2023] KEELRC 388 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KEELRC 388 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E150 OF 2021

AN MWAURE, J

FEBRUARY 10, 2023

BETWEEN

GITUAMBA STONES LIMITED .... APPELLANT

AND

HENRY OMONDI .... RESPONDENT

JUDGMENT

1. Gituamba Stones Limited, the appellant herein, filed an appeal against the judgment and decree of the chief magistrate at Nairobi, the honourable D O Mbeja (Mrdelivered on October 29, 2021 in MC ELRC no 592 of 2018). In the judgment, the learned trial magistrate found the appellant culpable and awarded 12 months' compensation for unlawful and unfair termination together with interests at court rates from the date of filing of the claim.

2. The appellant being dissatisfied with the judgment of the trial court seeks that it be set aside on the following grounds as raised in the memorandum of appeal:

   a. That the learned trial magistrate erred in law and fact in finding the respondent's summary dismissal from employment as unlawful and unfair despite compelling evidence showing that there were valid and fair grounds for dismissal.

   b. The learned trial magistrate erred in law and in fact in awarding the maximum compensation of 12 months' salary and one (1) month notice pay in complete disregard of the factors enumerated in section 49(4) of the *Employment Act*.

   c. The learned trial magistrate erred in law and fact in awarding the respondent service pay in complete disregard of the provisions of section 35 (5) and (6) of the *Employment Act* and notwithstanding the fact that the claimant was a member of the National Social Security Fund and was therefore exempted by the law to claim service pay.

d. The learned trial magistrate erred in law and fact in awarding the respondent annual leave of ksh 42,995/ notwithstanding the fact that the respondent had no outstanding leave pay and had abandoned the claim for annual leave.

e. The learned trial magistrate erred in law and fact in awarding interest from the date of filing suit despite the established principles of law and practice where interest on compensatory damages is awarded from the date of judgment.

f. The judgment of the learned trial magistrate is against the law and weight of the evidence on record.

3. The appellant seeks the following orders;

a. The trial court's judgment and finding that the respondent' s employment was unfairly terminated be set aside.

b. The awards of service pay, annual leave pay, notice pay and compensation be set aside

c. Costs of the suit in the lower court and the costs of the appeal be awarded to the appellant.

Respondent's case

4. The respondent in his memorandum of claim dated November 26, 2018 and filed on December 04, 2018 averred that he was employed by the appellant as a quarry pit supervisor and he duly performed and discharged his obligations conscientiously and diligently during his period of service.

5. On or about August 29, 2018, the claimant was unlawfully and without any just cause or lawful excuse summarily dismissed vide the respondent's letter dated August 29, 2018 which letter was addressed to the claimant and delivered to him on the same date.

6. That the claimant was neither given an opportunity to be heard nor an avenue to test the veracity of the allegation of gross misconduct as fronted against him.

7. The claimant states he was being called upon to give answers to the allegations in respect of which the respondent had already taken a final and conclusive decision. The claimant also contended that he was never paid his terminal dues.

Appellant's case

8. The appellant in his response to the claim said that the claimant in his capacity as the quarry supervisor alongside one Anthony Njoroge who was the quarry manager were involved in activities that were contrary to the employment contract and the interests of the employer in charging entry charges to excavators loading within the quarry, charging ksh 200 per trip for each vehicle carrying hardcore to the quarry and allowing 37 quarry operators to operate without licence/approval and receiving unlawful payment of ksh 2,500 per month from each operator.

9. The two were also said to have been operating the quarry in competition with the respondent/ appellant employer contrary to the employer's policy. The appellant avers that prior to the dismissal the employer investigated the matter and found the claimant culpable after giving the claimant a chance to exonerate himself.

10. The trial magistrate upon considering the evidence on record and submissions by the parties entered judgment in favour of the claimant/respondent and awarded him 12 months' salary compensation, service pay, annual leave and interests from the date of filing suit.

11. A memorandum of appeal dated November 25, 20921 was then filed and served. The parties agreed to have the appeal disposed by way of written submissions.

Appellant's written submissions

12. The appellant in his submissions says that the trial court allowed the following prayers contained in the memorandum of claim,

    a. Declaration that the respondent's dismissal from employment was unfair

    b. One month salary in lieu of notice ksh 53,232

    c. Service pay ksh 583,505.62

    d. Annual leave ksh 42, 995.08

    e. 12 months compensation ksh 638,784/=

13. The appellant citing section 43 (2) of the *Employment Act*, 2007 argued that the standard of proof required of an employer to prove reasons for termination is on balance of probability. The appellant relied on the case of *Kenya Revenue Authority vs Reuwel Waithaka Gitahi and 2 others* 2019 eKLR where the Court of Appeal found that the standard of proof required is on a balance of probability and not beyond reasonable doubt and all the employer is required to prove are the reasons that it 'genuinely believed to exist' causing it to terminate the employee's services. The appellant urges that in the instant case, the respondent only needed to prove that the reasons for the claimant's termination genuinely existed and touched on the claimant's level of honesty as an employee.

14. The appellant submitted that employment contract thrives on confidence and trust. Once trust is eroded, it becomes impossible for an employer to rely on someone who acts in bad faith by allocating quarry pits and pocketing the fees and also imposes illegal charges to quarry operators and service providers for his own benefit.

15. The trial court therefore erred in elevating the standard of proof required of the employer in establishing whether the claimant had committed the acts complained of to one beyond reasonable doubt instead of the standard of the balance of probabilities. The respondent having contributed to his own termination of employment is underserving of the remedy of Notice Pay and compensation. The trial court failed to base any of its decisions in giving remedies on the items stipulated in section 49 (4) of the *Employment Act* 2007.

16. The appellant urged the court to be persuaded by the holding in the case of *Kennedy Kioko Wambua versus Consolidated Bank of Kenya* 2019 eKLR which held that 'thus even if the termination was unfair for want of service of the show cause notice, the court returns that the claimant fully contributed to his dismissal in view of the established reason for the dismissal. Thus, he is underserving of any award under section 49 of the Act.

17. The appellant also submitted that the claimant was a member of NSSF and that section 35 (6) excludes employees who are members of NSSF from claiming service pay. The appellant relied on the case of *Hassanath Wanjiku versus Vanela House of Coffees* 2018 eKLR where the court held that

> " under section 35 (6) an employee who is a member of NSSF is not entitled to service pay. The claimant having been a member of NSSF is not entitled to service pay. She is also not entitled to severance pay as she was not declared redundant".

18. The claimant had taken his leave days and was only left with the pro rata leave for 15 days which in evidence he admitted to have been paid.

19. On the interests awarded on the award, the appellant relies on, *inter alia*, the case of *Mukisa Biscuits Manufacturing Co Ltd versus West End Distributors Limited* (No 2 (1970) E A 469 at 475 where Spry V P stated that

> "where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is only given from the date of judgment".

Respondent's submissions

20. The respondent/claimant submits that the respondent was effectively dismissed on August 29, 2018 and yet he was being told that he could file an appeal against the same dismissal and at the same time any such appeal would have been of no effect. The respondent was not given a chance to counter the allegations made against him before his termination.

21. The respondent submitted that the burden of proof lied squarely on the shoulders of the appellant to prove before the trial court that the alleged reasons for termination were indeed true, valid and factual. The respondent referred to the findings of the trial court where the learned magistrate noted that although respondent's witnesses 2 and 3 testified that they gave the claimant ksh 50,000/= respectively in 2018, it is interesting to note that their individual witness statements dated February 17, 2020 do not allude to the exact amounts paid to the claimant.

22. It has also been urged that the two would be crucial witnesses for the appellant namely James Njau and Paul Nzioka and yet were not called as witnesses. First respondent witness Mr Derrick Abwora could not testify to facts which were not within his knowledge. It is said that he became Manager of the appellant company on April 1, 2020 whilst Mr. Omondi was dismissed on August 29, 2018.

23. The respondent /claimant further says that the totality of the evidence is that the appellant's evidence was not authentic and truthful. It was irregular and the reasons given were not valid. The justification given and the testimony of the appellant witnesses were not credible. The respondent/claimant relied on the case of *Ken freight E A versus Benson Nguti* 2016 e KLR where the Supreme Court stated 'Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is one provided under section 49 (1) of the *Employment Act* 2007. The respondent submitted that payment of an award under section 49 (a) is different from an award under section 49 (1) (b) (c). Section 49 allows an award to include any and all of the listed remedies provided that the court making the award exercises its discretion judiciously and is guided by section 49 (4) (m).

24. The respondent further submitted that under section 49 (1) he was properly awarded 12 months compensation at ksh 638,784/=. The section provides that the 'equivalent of a number of months wage or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

25. The respondent urges that the claimant was earning monthly salary of ksh 53,232/= and he was terminated without notice which under section 44 (2) he was entitled to the awarded compensation.

Determination

26. As the first appellate court, it is the duty of the court to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw its own independent conclusion and to satisfy itself that the conclusions reached by the trial magistrate are consistent with evidence. In the case of *Selle versus Associated Motor Boat Company Ltd* 1968 EA 123 where the court held " this court must consider the evidence, evaluate it itself and draw its conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.

27. The court has considered the judgment of the trial court, the record of appeal, the submissions by counsels as well as the authorities cited and the law. The issues for determination can be summarized as follows:

    1. Whether the trial court erred in finding that the respondent's summary dismissal was unprocedural, unlawful and illegal.

    2. Whether the learned magistrate erred in awarding the compensation he did for unlawful and unfair summary dismissal.

28. Section 41 (2) of the *Employment Act* provides that "Notwithstanding any provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representation which the employee may on the grounds of misconduct or poor performance and the person if any chosen by the employee within subsection (1) make.

29. In *Pius Machafu Isindu vs Lavington Security Guards Limited* [2017] eKLR, the Court of Appeal stated that:

    > " There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination under (section 43) and prove that the grounds are justified as provided in section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination."

30. The appellant as demonstrated by the foregoing authorities did have the obligation to ensure there was due notification and hearing before termination of the respondent/claimant.

31. There was no notification and hearing before the appellant took the decision to terminate the respondent/claimant. This is indeed confirmed in the letter of dismissal dated August 29, 2018 which states that the employment was terminated as per recommendation of the management after their investigation. Absence of the notification and hearing indicate the respondent/claimant had no chance to give an explanation of any charges and in the presence of a fellow worker of his choice or a floor union representative.

32. Also, the respondent/ claimant's evidence in answer to the allegations fronted by the appellant is that his role as quarry supervisor did not involve collection of payments for quarry operators and there were clerks at the sales office and the operators were charged at the gate for doing sales. This evidence was not controverted by the appellant. The appellant did not therefore profer valid reasons for termination and therefore did not justify the grounds of termination as provided in section 45 and section 47 (5) of the *Employment Act*.

33. The court is persuaded by a myriad of authorities *inter alia* the case of *Pius Machafu Isindu vs Lavington Security Guards Limited* (2017) eKLR where Court of Appeal held that the employer must prove the reasons for termination under section 43 are justified and section 47(5) as well among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

34. In all fairness the court finds the appellant failed both in substantial justification and in procedural fairness in terminating the respondent/claimant. These are the two twin tests provided in the case of *Walter Onuro Ogul vs Teachers Service commission* cause No 955 of 2011 where it was held:

    " For termination to pass the fairness test it ought to be shown that there was not only substantive justification for termination but also procedural fairness."

    In that respect the court is satisfied the trial magistrate was right to find that the respondent was unfairly and wrongfully terminated and hence the appeal fails on that score.

Remedies awarded

35. As to whether the trial magistrate erred in making the awards, in Civil Appeal no 127 of 2015, between *Postal Corporation of Kenya and Andrew K Tanui* the Court of Appeal at Nairobi in varying the award given under section 49(1) (c) observed that it was necessary to consider not only the effect of the dismissal, but also the intention of Parliament in capping compensatory awards. It was also relevant to consider other comparable awards made in similar circumstances but none was considered in this case. It was a blanket award with no comparable justification.

36. Whilst the hon magistrate had the discretion to award the maximum compensation of 12 months' salary compensation, such ought to have been justified i.e by stating the reasons that went into the decision to settle for the maximum award and where necessary make reference to an award which was comparable. From the suspensions letters produced as evidence by the appellant in court, it is apparent that the appellant had issues that went to the honesty of the claimant/respondent and the employment relationship was fraught with distrust as the result of this. To an extent respondent contributed to his termination from even his past behaviour. In light of this and the considerations listed under section 49 (1) and (4), three months gross salary compensation is adequate compensation in the circumstances. The court therefore substitutes the 12 months gross salary awarded with 3 months' salary compensation 53,232 x 3 = 159,696.

37. The appellant should have given respondent/claimant notice of one month notice. The one-month salary in lieu of notice given by the magistrate remains and is justified.

38. On service pay, section 35 (5) of the *Employment Act* 2007 provides that 'An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed. Subsection (6) provides that 'This section shall not apply where an employee is a member of— (a) a registered pension or provident fund scheme under the Retirement Benefits Act; (b) a gratuity or service pay scheme established under a collective agreement; (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and (d) the National Social Security Fund'.

39. The hon magistrate alluded to the contention of the appellant that the respondent/claimant was a member of NSSF and not entitled to service pay. He did not, however state why he proceeded to award the service pay. Claimant witness did confirm as noted in page 15 of the judgment that NSSF contributions were remitted. The respondent also admitted he was paid for leave days. Both the service

pay award and leave pay did not therefore lie. The award for the service pays as well as the leave pay are accordingly set aside. The respondent/claimant submissions on this point in the appeal was on severance pay under section 40 (1) (g) of *Employment Act*. This position is misconceived as the claimant was not declared redundant. What was awarded cannot therefore be construed as severance pay which is only applicable on redundancy. In any event, the respondent only asked for service pay in the claim. The award of ksh 583,505.62 is hereby set aside therefore.

40. It is settled law that interests on judgment only arises after the assessment as noted in the celebrated law of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd* (no 2) (1970) referred to hereinbefore. Interests awarded on the above is therefore as from date of this judgment till full payment.

41. The upshot is that the appeal partially succeeds as it is upheld that the respondent/claimant was unlawfuly terminated. He is awarded the following:-

    a. 3 months' salary compensation for unlawful termination ksh53,232 x 3 = 159,696.

    b. One month salary in lieu of notice = ksh 53,232

       Total = Ksh 212,928 and award by the honourable magistrate therefore is set aside.

    c. Interest will accrue from date of this judgment.

    d. Each party will pay their costs on this appeal.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 10TH DAY OF FEBRUARY 2023.

ANNA NGIBUINI MWAURE

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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

ORDER

The court after delivering the judgment and upon inquiry by the counsels noted it had inadvertently overlooked to address costs of the subordinate court. The court now corrects that error and orders costs to the respondent/claimant as awarded by the subordinate court based on the revised award.

Orders accordingly.

ANNA NGIBUINI MWAURE

JUDGE