



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Jumbo Nile Limited v Oginga (Appeal E031 of 2021)
[2023] KEELRC 730 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 730 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E031 OF 2021
CN BAARI, J
MARCH 23, 2023**

BETWEEN

JUMBO NILE LIMITED APPELLANT

AND

THOMAS OTIENO OGINGA RESPONDENT

(Being an appeal against the Judgment and Decree of Hon. R. K. Ondieki delivered on 23rd September, 2021 in Kisumu CM Employment Cause No. 392 of 2019)

JUDGMENT

1. The appellant's memorandum of appeal is dated August 31, 2021, and filed on similar date. The appeal arises from a Judgment delivered on August 3, 2021, where the respondent was awarded terminal benefits, 12 months' salary as compensatory damages, costs of the suit and interest thereon.
2. The appeal is premised on the following grounds: -
 - i. The learned trial magistrate erred in law and fact by making a finding that the claimant was unlawfully terminated.
 - ii. That the learned trial magistrate erred in law and fact by making a judgment that the respondent had refused to pay the claimant his terminal dues when the same had already been paid.
 - iii. That learned trial magistrate erred in law and fact by making a declaration that the claimant is entitled to the payments of terminal dues as well as compensatory damages and awarding the same.
 - iv. That the learned trial magistrate erred in law and fact by failing to find that the claimant had already been paid his dues and had discharged the respondent.



- v. That the learned trial magistrate erred in law and fact by failing to consider the principles set out in the law with regard to the termination of employment and the damages to be paid.
 - vi. That the learned trial magistrate erred in law and fact by awarding the claimant damages for 12 months for loss of employment when the claimant had only worked for six months.
 - vii. The learned trial magistrate erred in law and fact by failing to find that the claimant termination of employment was procedurally done as per the law and all dues paid.
 - viii. The learned trial magistrate erred in law and fact by failing to consider the submissions and the authorities submitted by the appellant hence arriving at a wrong decision.
 - ix. That the learned trial magistrate erred in law and fact by failing to properly analyze the evidence on record thereby arriving at a wrong decision.
 - x. The learned trial magistrate erred in law and fact by entering a judgment that is manifestly excessive and out of the way without any supportive evidence.
 - xi. That the learned trial magistrate erred in law and fact by awarding the claimant one-month salary in lieu of notice and leave earned when the same had already been paid and acknowledged and notice given.
 - xii. The learned magistrate decision was against the weight of evidence.
 - xiii. That the learned magistrate misapprehended the evidence adduced by the respondent in material degree and a result arrived at a wrong decision.
3. Parties sought to canvass the appeal through written submissions, and submissions were filed for both parties.

The Appellant's Submissions

4. It is submitted for the appellant that in the Trial court's judgment, the court found that there was unlawful termination, and without addressing the issues raised by the appellant on payments being done and signing of the certificate of settlement, proceeded to award terminal dues as claimed in the memorandum of claim. It is the appellant's further submission that the court failed to consider the issues raised by the appellant both in evidence and submissions.
5. It is the appellant's submission that despite the evidence in court alluding to payment of both leave and one-month salary in lieu of notice, the court proceeded to award the two prayers contrary to the evidence on record.
6. The appellant submits that the trial court in its judgment awarded the respondent terminal dues without distinguishing the claims under the prayer for terminal dues, the respondent having worked for only a period of 6 months.
7. The appellant submits that the learned magistrate failed to give reasons as to why he awarded 12 month's salary in respect to a person who had worked for less than 6 months. The appellant sought to rely in Nairobi Court of Appeal Civil Appeal No. 146 of 2013 *United States International University v Eric Rading Outa* [2016] eKLR to support this position.
8. The appellant submits that the respondent was procedurally terminated and paid his final dues and having discharged the appellant, he is not entitled to any compensation for unlawful termination. It is the appellant's further submission that in the unlikely event that the court finds that the respondent



was entitled to payment for unlawful termination, the court should consider that he only worked for less than six months and be awarded only one-month salary.

9. The appellant submits that the learned magistrate failed to realize that in the memorandum of claim, the claimant had listed damages for loss of employment as part of his terminal dues and by awarding terminal dues and general damages separately, he allowed double compensation for unlawful termination.
10. It is submitted that the trial court fell into error by not making a clear distinction that the claim under terminal dues does not include damages for loss of employment for 12 months as had been sought by the respondent. The appellant had reliance in *Paddy Chris Adhola v Orpower 4 INC. Limited* [2021] eKLR for the holding that there are no general damages awardable in wrongful termination.
11. It is the appellant's further submissions that the respondent having voluntarily signed payment for final dues before the labour officer and received his cheque which dues included the notice and leave, he was not entitled to any payment for terminal dues and pray that the award be set aside with costs. The appellant placed reliance in *Coastal Bottlers Limited v Kimathi Mithika* [2018] eKLR to support this position.
12. It is submitted that payment of one-month salary can only be claimed and awarded in the event notice was never issued. The appellant further submits that notice was issued and duly acknowledged that the respondent received one-month notice for termination.
13. It is further submitted that the trial court in its judgment did not distinctively analyze the prayers sought, but only focused on the issue of unfair termination and granted the other prayers without any consideration.
14. The appellant prays that this court allows the appeal as prayed.

The Respondent's Submissions

15. The respondent submits that he agrees with the trial court, and align himself with the decision that the appellant did not follow the rightful procedure in terminating him, hence the trial court did not err.
16. The respondent further submits that the failure by the appellant to state the reason for termination, denies the respondent and the court the opportunity to apply the soundness or the legitimacy and justification of the termination and therefore a fundamental flaw in the procedure applied by the appellant.
17. The respondent submits that there is no law that prevents the courts from awarding the maximum award where the employee is aggrieved. It is the respondent's further submission that his contract was not fixed term contract, and as such, the trial court rightfully exercised jurisdiction in awarding as it did.
18. It is the respondent's submission that a discharge voucher does not absolve an employer from statutory obligation and that it cannot preclude the court from enquiring into the fairness of a termination. It is the respondent's further submission that the trial court rightfully found that the appellant had wrongfully terminated the him, and that he was entitled to terminal dues as awarded.
19. The respondent urges the court to uphold the decision of the lower court, and dismiss this appeal for lacking in merit.



Analysis and Determination

20. I have considered the appellant's record of appeal together with the submissions by both parties. The grounds of appeal are summarized as hereunder: -
- i. The learned trial magistrate erred in law and fact by making a finding that the claimant was unlawfully terminated.
 - ii. That the learned trial magistrate erred in law and fact by failing to find that the claimant had already been paid his dues and he discharged the respondent.
 - iii. That the learned trial magistrate erred in law and fact by awarding the claimant damages for 12 months for loss of employment, when the claimant had only worked for six months.
21. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated thus: -
- “An appeal to this court from a trial by the High Court is by 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 allowances in this respect.”
22. On whether the trial court erred in arriving at the decision that the respondent/claimant was unfairly terminated, it is clear from the evidence on record that the respondent was only issued notice of termination and not taken through a disciplinary process or at the very least given reasons informing his termination.
23. In this regard, I concur with the finding of the trial court that termination notice without compliance with section 46 of the *Employment Act*, renders the termination unprocedural, hence unfair.
24. The declaration that the respondent was unfairly terminated is upheld.
25. The respondent also acknowledged having been served with notice of termination and serving through the notice period. The termination notice produced in evidence, is dated July 8, 2019, and the notice was to take effect one month later.
26. Further, the payment voucher and the cheque issued to the respondent on account of leave and the days worked, are dated August 8, 2019. This in my view, is confirmation that the respondent remained in the service of the appellant for the entire notice period. For this reason, the trial court's award on account of notice is unmerited and is set aside.
27. On the award for payment of terminal dues, the respondent's evidence indicates that he was paid for leave not taken, and for the days worked in the month of August, 2019. This payment in my view, is what constitutes the respondent's terminal dues.
28. The award by the trial court on account of terminal benefits is therefore not justified as it is not clear what formed the terminal benefits awarded by the trial court.
29. It is also not disputed that the respondent executed a discharge voucher, which in essence, and for being a contract between the parties, bars him from making any further claims against the appellant. The



Court of Appeal fortified this position in *Coastal Bottlers Limited v Kimathi Mithika*[2018] eKLR as follows: -

“In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent’s termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent’s part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties.”

30. The respondent herein did not deny signing the discharge and cannot thus be heard to say that the same is of no legal effect.
31. Consequently, and for the reasons foregone, the award of terminal benefits is not justified and is set aside.
32. The trial court awarded the respondent 2 months’ salary as compensatory damages for the unfair termination. Indeed, a finding of an unfair termination, entitles the respondent to compensation as envisaged under section 49 (4) of the *Employment Act*.
33. The appellant contested the award based on the period the claimant/respondent was at their service and the warning letters issued to the respondent for various acts of misconduct. The appellant further contended that the respondent was awarded 12 months’ salary in damages. The judgment before this court, indicates that the award of damages for the unfair termination is only two months.
34. In my considered view, an award of two months’ salary for the unfair termination was reasonable. The award is upheld.
35. In the upshot, I make orders as follows: -
 - i. The declaration that the respondent was unfairly terminated is upheld.
 - ii. The award of two (2) months’ salary as compensation for unfair termination is upheld.
 - iii. The award of one month’s salary in lieu of termination notice is set aside.
 - iv. The award of terminal benefits is set aside.
 - v. Parties shall bear their own costs of the appeal.
36. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 23RD DAY OF MARCH, 2023.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Bagada present for the Appellant

Mr. M. C. Ouma present for the Respondent



MS. Christine Omolo - Court Assistant.

