



Shiloah Investment Limited v Nyakundi (Employment and Labour Relations Appeal E035 of 2022) [2023] KEELRC 1036 (KLR) (27 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 1036 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E035 OF 2022**

**CN BAARI, J
APRIL 27, 2023**

BETWEEN

SHILOAH INVESTMENT LIMITED APPELLANT

AND

JAMES NYAKUNDI RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. K. Cheruiyot (SPM) delivered on 27th July, 2022 in Kisumu CMELRC no. 402 of 2019)

JUDGMENT

1. This appeal arises from a Judgment rendered on July 27, 2022, where the Trial Court found in favour of the Respondent and entered judgment as prayed in the Respondent's statement of claim. Specifically, the court awarded the Respondent a total of Kshs 1,190,497.78/ comprising of the principle award, the interest on principle and costs.
2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on October 7, 2022.
3. The appeal is premised on the grounds THAT:
 - i. The Learned Magistrate erred in law by awarding the principle amount of Kshs 899,827.00 which amount is neither prayed for in the prayers in the Statement of Claim, nor was it specifically proven.
 - ii. The Learned Magistrate erred in law and fact by awarding Gratuity where the Claimant was registered for NSSF and did not prove that there were no remissions of his NSSF deductions.
 - iii. The Learned Magistrate erred in law and in fact by awarding Gratuity yet the termination was not due to a redundancy.



- iv. The Learned Magistrate erred in law by granting a Certificate of Costs where the Bill of Costs was never filed, served and taxed.
 - v. The Learned Magistrate erred in law by awarding interest for the whole year where only 36 days had elapsed and were prayed for.
4. Submissions on the appeal were filed for both parties.

The Appellant's Submissions

5. It is the Appellant's submission that it is aggrieved by the decision of the Trial Court to grant an award of gratuity when it was not among the prayers sought in the Respondent's statement of claim. The Appellant had reliance in [*Anthony Yamo Ibito v Basco Products \(Kenya\) Limited \[2022\] eKLR*](#) to support his position.
6. The Appellant further submits that the court erred by awarding a certificate of costs where the bill of cost was never filed, served and taxed. It is the assertion of the Appellant that a certificate of costs was issued as part of the decree despite the Claimant's/Respondent's counsel not having filed a bill of cost nor taxed the same for a certificate of cost to be issued.
7. The Appellant further submits that the court proceedings do not capture any date scheduled for the taxation of the party and party costs.
8. It is the Appellant's submission that the court erred in awarding interest for the whole year when only 36 days had elapsed, and were prayed for. It is its further submission that the interest calculation found in the decree is for the period from July 27, 2022 to September 2, 2022 at 14% p.a hence the period claimed is therefore about one month – the month of August, 2022, yet the interest tabulated and added is for 12 months (1 year) being Kshs 125,975.78.
9. The Appellant prays that the court allows the appeal against the decree on the grounds herein stated.

The Respondent's Submissions

10. The Respondent submits that he was indeed a registered member of NSSF and as such exempted from an award of gratuity as provided for under Section 35(6)(d) of the [*Employment Act*](#).
11. The Respondent submits that the Trial Magistrate having made a finding that his termination was unfair, rightly entered judgment in his favour as prayed in his Statement of Claim dated November 6, 2019. The Respondent further submits that the Appellant is not in any way disputing the judgment in as far as it was held that the Respondent was unfairly terminated, and that the dispute is on whether or not the Trial Magistrate should have awarded the Respondent compensation after declaring that he was indeed unfairly terminated.
12. It is the Respondent's submission that he clearly pleaded in the Memorandum of Claim for an award of 12 months' salary as compensation for unfair termination, and that once a court has made a finding that an employee has been unfairly terminated then while guided by the provision of Section 49(1)(e) and 49(4)(e) of the [*Employment Act*](#), it is allowed to make an award of damages.
13. The Respondent further submits that the Appellant has not shown why this Honourable Court should disturb the award, and pray that the same should not be interfered with. The Respondent placed reliance in *Butt v Khan (1981)* to emphasize this position.
14. The Respondent finally prays that this Court upholds the judgment of the trial Court.



Analysis and Determination

15. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized into the following three grounds: -
 - i. The Learned Magistrate erred in law by awarding an amount of Kshs 899,827.00 which amount is neither prayed for in the Statement of Claim, nor was it specifically proven.
 - ii. The Learned Magistrate erred in law by granting a Certificate of Costs where the Bill of Costs was never filed, served and taxed.
 - iii. The Learned Magistrate erred in law by awarding interest for the whole year where only 36 days had elapsed and were prayed for
16. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd [1985] EA*, Madan JA had this to say on appeals:

' The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law: secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.'
17. The Trial Court's finding and subsequent declaration that the Respondent herein was unfairly terminated is not contested. The issue in dispute is the award of compensatory damages which the Appellant states was not pleaded.
18. The Respondent/Claimant's claim at its paragraph 9, is a prayer for judgment against the Appellant/ Respondent for a declaration that the Respondent's summary dismissal is unfair and unlawful, a declaration that he is entitled to compensatory damages, an award of gratuity and costs of the suit and interests thereon.
19. By this paragraph alone, it is clear that one of the reliefs sought by the Respondent is an award of compensatory damages. The Trial Court contrary to the Appellant's assertion, did not therefore err in making an award of compensatory damages, the relief having been specifically sought under the claim.
20. In the Respondent's claim, 12 months' compensation for unfair termination amounts to Kshs 635,172.00, while the award under the decree in this matter refers to a principal amount of Kshs 899,827.00. I would thus assume that this amount includes gratuity, as the Trial Court did not explain how it arrived at the amount.
21. The trial court's award of gratuity has been challenged premised on the argument that the Respondent is a member of the NSSF and that the Appellant remitted his contribution, or that there is no claim that the Respondent's contributions were not remitted to the Fund.
22. The Respondent in his submissions, has admitted that he was a member of the NSSF and that he was not entitled to payment of gratuity. Gratuity is only payable where it is an express term of an employee's contract of service or a provision under a collective bargaining agreement which applies to the particular employee.



23. In *Anthony Yamo Ihito v Basco Products (Kenya) Limited* [2022] eKLR, this Court stated thus:
- ' Section 35(6) of the *Employment Act* exempts employees covered under NSSF from the payment of service pay or any other form of pension. Moreover, the Claimant's contract of service did not provide for payment of gratuity which would have been an exception to this provision.'
24. The Respondent's letter of appointment does not provide for payment of gratuity. The letter indicates that he is appointed as a non-unionisable employee, and there would thus be no collective bargaining agreement applicable to him.
25. I find and hold that the Trial Court erred in awarding gratuity and the award in respect of gratuity is set aside.
26. Having found that the prayer for compensation had been pleaded, the award of compensatory damages for the unfair termination is upheld.
27. On the question of whether a magistrate or a subordinate court can determine costs payable in cases before it, Section 27 of the *Civil Procedure Act* gives both the subordinate court and the High Court discretion and the jurisdiction to not only award costs but determine the extent to which those costs are to be paid and by which party.
28. Further, Paragraph 49 of the Advocates Remuneration Order clearly defines a 'court' to mean both the High Court or any judge thereof or a Resident Magistrate's Court or a Magistrate sitting in a Magistrate's Court. A court in Part III of the Advocates Remuneration Order is given the mandate to determine costs in contentious matters as between advocate and client and between party and party.
29. In view of the foregoing, I do not find anything wrong for magistrates to proceed to assess costs payable in a case before them.
30. I am therefore clear in my mind that a magistrate's court has jurisdiction to assess costs and as a matter of law, paragraph 51 of the *Advocates Remuneration Order* gives the scale applicable.
31. The Trial Court's decision to assess costs payable is upheld.
32. In whole, the Court makes orders as follows: -
- i. The Trial Court's finding that the Respondent was unfairly terminated is upheld.
 - ii. The award of 12 months' salary in compensation for unfair termination is upheld at Kshs 635,172.00
 - iii. The award of gratuity is set aside.
 - iv. The award of costs and interest and the assessment by the trial court is upheld.
 - v. Parties shall bear their own costs of the appeal.
33. Judgment accordingly.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF APRIL, 2023.

C. N. BAARI

JUDGE



Appearance:

N/A the Appellant

Ms. Olendo present for the Respondent

MS. Christine Omolo - Court Assistant.

