



Ruthaka Farmers Co-operative Society v Kaburi (Employment and Labour Relations Appeal E009 & E010 of 2022 (Consolidated)) [2023] KEELRC 849 (KLR) (13 April 2023) (Judgment)

Neutral citation: [2023] KEELRC 849 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS
APPEAL E009 & E010 OF 2022 (CONSOLIDATED)

ON MAKAU, J

APRIL 13, 2023

BETWEEN

RUTHAKA FARMERS CO-OPERATIVE SOCIETY APPELLANT

AND

ALICE WANJIRA KABURI RESPONDENT

*(Being an Appeal against the Judgment of Honorable D.K. Matutu,
Principal Magistrate at Mukurwe-ini Principal Magistrates
Court ELRC Case No. 1 of 2019 delivered on 14th June, 2022)*

JUDGMENT

1. The respondent was employed by the appellant as a Book Keeper from 1st October 2004 earning a monthly salary of Kshs.23,805.00. On 22nd June 2017, her services were terminated by the employer without any prior warning or notice. She was also not given any hearing before the termination and the reason cited for the termination was false and ill-motivated. The employer had also failed to pay her the correct salary as per the Collective Bargaining Agreement (CBA) concluded between the employer and her trade union, Kenya Plantations and Agricultural Workers Union (KPAWU). The employer further failed to pay her terminal dues and issue certificate of service upon separation. Consequently she brought suit before the subordinate court seeking terminal benefits amounting to Kshs.1,040,583.52, compensation for unfair termination, certificate of service, costs and interest.
2. The appellant filed defence dated 9th May, 2019 denying liability for the reliefs sought. It averred that the termination of the respondents employment was lawfully done for gross misconduct cited in the termination letter dated 22nd June 2017 namely, absenteeism in April and May 2017, and theft and gross dishonesty by drawing full salary despite her absenteeism. Further that the respondent was not a member of KPAWU and therefore she was not entitled to benefit from the purported CBA. Finally the suit was described as extortivist and without merits hence fit for dismissal with costs.



3. The respondent filed Reply to the defence on 24th May, 2019 reiterating that the reason for her dismissal was ill founded and only an excuse to send her away. Further she reiterated that the CBA covered her and therefore she was entitled to full benefits and rights prescribed therein.
4. Upon hearing, the trial court (Hon D.K Matutu PM) considered the evidence and the submission filed and framed the following issues:-
 - a. Whether the termination of claimant's employment was wrongful, unfair and unlawful.
 - b. Whether the claimant has proved her case to the required standard and therefore merits the grant of the relief sought.
5. In his judgment he answered the two questions in the affirmative and awarded the respondent only the prayer for the terminal dues of Kshs.1,040,583.52 plus costs and interest from the date of judgment.
6. Appellant was aggrieved by the whole judgment and filed the instant appeal on 7th July, 2022 raising the following grounds:-
 1. That the learned trial magistrate erred in law and in fact in giving a judgment devoid of legal and evidential analysis thereby falling into error and a fatal miscarriage of justice.
 2. That the learned trial magistrate erred in law in unjustly enriching the respondent where even for monies paid as terminal dues and acknowledged in evidence, no credit is granted thereby leading to a clear miscarriage of justice.
 3. That the learned trial magistrate erred in law and in fact in failing to apply the law and evidence juridically and arriving at a clearly invalid conclusion on the validity of the documentary evidence adduced by both the claimant and the respondent. A miscarriage of justice ensued.
 4. That the learned trial magistrate erred in giving an unreasoned award without any lota of evidential of legal justification.
 5. That the judgment herein is against the weight of evidence, and the law applicable and should be set aside.
7. The respondent was also dissatisfied with the judgment to the extent that the trial court failed to award her and assess compensation for unfair termination. Therefore she filed a separate appeal (No.ELRC E010 of 2022) on 12th July 2022 raising the following grounds:
 1. The learned trial magistrate erred in law for failing to award compensation for unfair termination.
 2. The learned trial magistrate erred in law for failing to assess the award for compensation for unfair termination.
 3. The learned trial magistrate erred in law for failing to finally determine all the issues and address all the reliefs in the claim before him.
8. The two appeals were consolidated on 25th January 2023 and direction were given for their disposal by way of written submissions.

Submissions.

9. The appellant herein submitted that the impugned judgment is woefully deficient in analysis and completely destitute in the ratio decidedi. Further that the trial court is enjoined by law to provide



- the reason for every holding and not to merely postulate that he believed the claimant and not the respondent without offering the grounds for such believing.
10. It was submitted that the appellant had been very categorical and firm in both its pleadings, evidence and submissions that:-
 - a. There was no CBA and the one brought to court was a forgery.
 - b. The claimant had been summarily dismissed for absenteeism and records were provided to the court.
 - c. After the dismissal the appellant tabulated the dues payable to the respondent and paid into her account, a fact she admitted during cross-examination.
 - d. The claim as filed had items that were time barred.
 11. It was further submitted that the court erred by failing to give reason for upholding the 2015 CBA which had been contested even by one of the persons who allegedly had signed it. As a result the foregoing matters the court awarded higher salaries and benefits than the correct CBA of 2013. The court was asked to review and analyze the evidence and find that the CBA on page 93-108 is the record of Appeal is the correct one between the appellant and KPAWU because almost all the pages bear the signature of the appellants' officials. The court was asked to find that the CBA on page 109-123 produced by the respondent was not authentic.
 12. It was further submitted that the correct salary for use in assessing the claims by the respondents is Kshs.19,838.00 as indicated in the genuine CBA on page 108 of the record of appeal. It was therefore argued that the alleged exit salary of Kshs.30,996.87 provided in the fake CBA is not applicable. It was observed the demand letter by the respondent's lawyer Mr.Peter M.Muthoni (page 18 of the record) used the exit salary of Kshs.19,838.00 to compensate her dues.
 13. As regards the second ground of appeal, it was submitted that the trial court erred in assessing the quantum of damages payable to the respondent. It was argued that the court failed to take into account the amount already paid to the respondent despite clear evidence on record produced by the appellant. The said evidence was computation of total dues of Kshs.269,464.00 which after deductions left a net of Kshs.108,986.00.
 14. As regards the issue of unfair termination, it was submitted that appellant had tendered evidence to show that the termination of the respondent was a perennial absentee without permission and therefore the dismissal was justified. Original attendance record (Book) was produced as exhibit to prove the said absence from work. Further that, she admitted that she had vied for a political seat and that explained why she was always absent from work. On ground that the termination was justified, the court was urged to find that damages are not payable.
 15. The respondent (Appellant in Appeal No.E10 of 2022) opposed the appeal by the employer and prayed for the same to be dismissed with costs. It was submitted that the trial court set out the facts of the case, the contentions and evidence from both parties and then from paragraph 17-22 of the judgment embarked on an analysis of the oral and documentary evidence tendered. The court also considered the applicable law, *Employment Act*. Consequently, it was submitted that the court clearly analyze the evidence and the law before him and arrived at the correct conclusion.
 16. As regards the alleged unjust enrichment, it was submitted that court found that the computation of terminal dues by the appellant was not signed by any of the parties and rightly rejected it. It was further submitted that the respondent had denied the alleged payment of terminal dues but the appellant failed to file a counter claim.



17. Further it was submitted that the allegation that the trial court failed to apply the law and evidence in his judgment, is a generalized, vague and self-defeating allegation. It was submitted that the CBA was produced by the appellant and it cannot turn away from its own exhibits. There being evidence that the respondent was a member of KPAWU, the appellant was estopped from denying the respondent her terminal dues under the CBA.
18. It was reiterated that trial court did not give an unreasonable award and that the decision was the product of thorough analysis of the evidence before the court.
19. As regards the issue of unfair termination, it was submitted that the respondent was dismissed for alleged misconduct without following a fair procedure set out under section 41 of the *Employment Act*. There was evidence that the respondent was not served with a show cause letter and she was not accorded any hearing before the termination.
20. As regards the award of damages for terminal dues, it was submitted that the defence witness admitted that the respondent was a member of KPAWU and that she was entitled to benefits under the CBA including salary arrears vide a letter dated 14th February 2015. Consequently it was submitted that there was overwhelming evidence in favour of the respondent and therefore it is not correct to accuse the trial court of entering judgment for the respondent against the weight of the evidence.
21. With respect to the respondent's appeal (E10 of 2022) it was submitted that, the trial court erred by failing to exercise her statutory duty of awarding and assessing compensation to the respondent for unfair termination. Having made a finding that the termination of the respondent's employment was unfair, section 50 required him to award and assess damages guided by section 49 of the Act.
22. For emphasis, reliance was placed on the Court of Appeal decision in *Gabriel Owe Okello v Ujenzi Quarries Ltd (2017) eKLR* where it was held that the trial court is bound to assess damages even where the claimant is unsuccessful.
23. In conclusion the court was urged to assess and award compensation to the respondent for unfair termination. In support of that request the case of *John Ngari Njiru v Security Kenya Group Ltd & Another (2021) eKLR* was cited.

Jurisdiction

24. This being a first appeal the mandate of this court is well cut out as it was explained by the Court of Appeal in the case of *Selle & Another v Associated Motor Boat Co.Ltd & Others (1968) EA 128* thus:-

“This court must reconsider the evidence, evaluate 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 (sic) to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

Analysis and determination

25. Having carefully perused and considered the two records of appeal consolidated herein, and the submissions by counsel, the following issues arise for determination:-



- a. Whether the trial court failed to analyze the evidence tendered and thereby rendered an irrational and unreasoned judgment.
- b. Whether the trial court erred in holding that the termination of the claimant's employment was unfair and unlawful.
- c. Whether the trial court erred by awarding the respondent terminal dues amounting to Kshs.1,040,583.52 as prayed.
- d. Whether the trial court erred in law and fact by failing to award and assess compensation for unfair termination as prayed.
- e. Which orders should be appropriate in the consolidated appeals?

Failure to analyze evidence

26. It was submitted for the appellant that the trial court did no analysis of the evidence and give reasons as to why he believed the respondent's case as opposed to the appellant's case. The respondent, on the other hand submitted that the trial court analyzed both oral and documentary evidence before him in paragraph 17 to 22 of the impugned judgement and arrived at the correct conclusion.
27. I have carefully considered the record, the impugned judgment and the submission made by counsel. In paragraph 2 to 11 of the judgment, the trial court summarizes the facts of the case as set out in the pleadings and evidence as presented by both parties while paragraph 12 to 16 is the summary of the submissions filed by counsel.
28. The court then framed the issues for determination in paragraph 17 of the judgment and proceeds to answer the issues by considering and analyzing the evidence in paragraph 18 to 23 of the judgment. He went on observe that the major issue was whether the termination of the claimants employment was lawful and went on to hold that fair process was not followed.
29. The reason for that holding was given as the failure to serve prior notice or to accord her a fair hearing. As regards the holding that the reason for termination was not proved, the trial court opined that the attendance records produced by the employer were erratic and did not appear to be original but tailor made to suit the defence case. Further the court made a finding that the claimant had proved her case on balance of probabilities. This far I am satisfied that the trial court, did indeed analyze the evidence and indicated the reasons upon which his conclusions were drawn.
30. However, it must be pointed out that the trial court rushed to make some conclusions without making proper analysis of the evidence and without assigning any reason therefor. In some instances the trial court failed to take into consideration some crucial evidence which was before the court.
31. To begin with I find that the contestation around the applicable CBA was not given the due analysis before the court concluded that the CBA dated 3rd February, 2015 produced by the respondent was a genuine document despite contention by the appellant. The trial court had a legal duty to give reasons as to why he reached that conclusion. The said duty was very crucial because the contested CBA was to form the basis upon the terminal dues were being sought.
32. Besides, the trial court failed to take into account the evidence tendered by the appellant to prove that the terminal dues had been computed and paid to the respondents account. Despite the court acknowledging that the respondent had filed the document dated 27th July 2017 indicating the computation of terminal dues and the net pay, the trial court went only as far as observing that the tabulation had not been signed by the respondent and the appellant's officials.



33. The court failed to consider the bank statements filed and the admission by the respondent that the net terminal dues was indeed paid into her account but it was applied to settle her loan.
34. Another area of failure to analyze evidence is on the Attendance Register which clearly indicated that the respondent was a perennial absentee. I will deal with that herein below but the extent highlighted above, I agree with the appellant that the trial court fell into error by failing to analyze some part of the evidence before him in his judgment and that affected the quantum of damages awarded to the respondent.

Unfair termination

35. Section 45 of the *Employment Act* provides that:-

- “(1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove –
- a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee’s conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”

36. The appellant submitted that it tendered evidence in the form of Attendance Register to prove that the respondent was a perennial absentee from work. I have considered the attendance register (page 73-91 of the record of appeal) and confirmed that respondent was indeed a perennial absentee from work especially in the months of April to June 2017. For example she was absent from work on 19th, 20th, 22nd, 23rd, 24th, 25th, 26th, 27th, 28th and 29th. In June she was absent on 3rd and 5th.

37. The respondent did not produce any evidence to prove that she was absent with permission or for a good cause. I find that the trial court erred in holding that the alleged absenteeism was not proved. Based on the attendance register aforesaid, it is my conclusion that the respondent was a perennial absentee and therefore the reason for termination was valid and fair within the meaning of section 44 (4) as read with section 45 (2) of the *Employment Act*.

38. As regards the second leg of fairness in termination of employment, I find that the trial court was right in holding that the termination was procedurally unfair. The respondent was not served with any prior notice and afforded a fair opportunity to defend herself before the termination. Section 41 of the *Employment Act* provides that:-

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering



termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other 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 representations 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.”

39. There is evidence on record to support the finding by the trial court that the respondent was condemned unheard contrary to the mandatory procedure set out by section 41 above. The said procedural lapse rendered the termination unfair and actionable.

Award of Kshs.1,040,583.52

40. The particulars of the terminal dues were set out in paragraph 6 of the statement of claim as follows:-

- a. Salary arrears for 2014.....Kshs.59,514.00
- b. Salary arrears, 2015.....Kshs.133,906.44
- c. Salary arrears, 2016.....Kshs.133,906.44
- d. Salary arrears, 2017.....Kshs.66,953.22
- e. House allowance arrears 2014.....Kshs.11,902.80
- f. House allowance arrears 2015.....Kshs.26,781.29
- g. House Allowance arrears 2016.....Kshs.26,781.29
- h. House allowance arrears 2017.....Kshs.13,390.64
- i. Unpaid salary May 2017.....Kshs.37,196.24
- j. Unpaid salary June 2017.....Kshs.22,733.24
- k. Annual leave 2016/2017.....Kshs.11,568.00
- l. Four months notice.....Kshs.123,987.48
- m. Gratuity pay.....Kshs.371,962.44

TOTAL Kshs.1,040,583.52

41. The said claim allegedly was based on a CBA which was not pleaded. However during the hearing each party filed a copy of the CBA which they contended to be the one applicable to the case in court. The respondent filed CBA dated 3rd February 2015 but effective 1st January 2014. The appellant filed an undated copy for the period 1st January 2012 and second CBA which was similar to the one filed by the respondent.

42. The filing by the appellant of the CBA similar to the one produced by the respondent's witness corroborated the evidence by the respondent that there was a CBA negotiated between the appellant and KPAWU in 2015 whose effective date was 1st January 2014. The foregoing conclusion is fortified by the minutes of the appellants committee held on 6th February 2015 (page 39 of the record of appeal). Minute 2/2015 (Collective Bargaining Agreement) indicated that Mr. Cheron (PW2) herein,



thoroughly took the committee through the CBA and the committee agreed to pay Kshs.2,413,209.08 on quarterly basis at Kshs.603,302.30 effective February 2015.

43. The appellant's case is that the new CBA was never registered in this court and therefore it never took effect. There is no evidence on record to prove that the CBA dated 3rd February 2012 was ever registered by this court. The procedure for registering a CBA is long and winding as it has to first go to the Cabinet Secretary in charge of labour for verification and approval before being lodged in this court for registration.
44. The said process had not taken place as at 6th February 2015 when the aforementioned committee of the appellant was taken through the CBA by the secretary for KPAWU and agreed to pay additional salaries in arrears. It follows that the said agreement based on a CBA which was not yet registered was invalid. The agreement could only become binding on the parties upon registration of the CBA.
45. Section 59 (5) of the Labour Relation Act provides that:-

“ A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.”
46. The burden of proving that the CBA dated 3rd February 2015 was ever registered was on the party wishing to rely upon it as prove of his case. The party with the burden herein is the respondent but she never adduced any evidence to prove that the CBA was registered and thus binding upon the parties herein. Therefore I find that the said CBA was not applicable to this case for want of registration by the court.
47. It follows that, the trial court fell into error by relying unregistered CBA to allow the claim for terminal dues. The correct CBA applicable is the undisputed one for the period starting 1st January 2012 produced by the appellant. The CBA provided for the same terms as the unregistered one except the schedule of General wages. The applicable salary is what the respondent was drawing as at the time of termination being Kshs.19,838.00 plus house of Kshs.3,967.60 equaling to Kshs.23,805.60.
48. In view of the foregoing, I now proceed to assess the terminal dues based on the CBA for 2012-2013. Clause 22 of the CBA provides for gratuity to employees whose services are terminated after completing 5 years of continuous service at the rate of 30 days' pay for each completed year of service. I assess gratuity at Kshs.19,838 x 13 months equally to Kshs.257,894.00.
49. The claim for arrears of salary and house allowance was pegged upon the enforceable CBA dated 3rd February 2015. In view of my hold above that said CBA cannot be enforced for want of registration, the claim for arrears of salary and house allowance collapses.
50. The claim for salary for the month of May and June 2017 must also fail. The respondent was absent. She never signed the attendance register on 2, 3, 4, 6, 8, 12, 15, 17, 19, 20, 21, 23, 24, 25, 26, 27, 28 and 29th May equally to 18 days. In April she earned full salary despite not signing attendance register on 1st, 3rd, 4th, 5th, 6th, 7th, 8th, 9th, 10th, 12th, 13th, 14th, 18th, 24th and 29th equaling to 15 days. In the month of March 2017 she drew full salary despite absent on 1st, 3rd, 4th, 6th, 7th, 8th, 9th, 10th, 11th, 13th, 14th, 15th, 16th, 17th, 18th, 20th, 21st, 22nd, 23rd, 24th, 27th, 28th, 29, 30th and 31st equaling to 26 days. Putting all the above factors into consideration I find that the respondent is not entitled to any salary for the month of May and June 2017 because she absented herself from work perennially without permission or demonstrated good cause for more days than she attended. A court of law cannot allow itself to be used by a perennial absentee to claim salary from an innocent employer.



51. The claim for leave for 2016/2017 amounting to 17.5 days being Kshs.11,568.00 was not disputed and it was admitted by the appellant.
52. The claim for 4 months salary in lieu of notice is granted because I have already made a finding of fact that the termination was unfairly done. Under section 49(1) of the *Employment Act*, an employee who is unfairly dismissed is entitled to salary in lieu of notice. Clause 18 (d) of the CBA for 2012-2013 provided for a termination notice of 4 months for an employee who completed 10 years continuous service. It is common ground that the respondent herein served for 13 years continuously. Therefore he is awarded Kshs23,805.60 x 4 Equally to Kshs.95,222.40.
53. In view of the matters highlighted above I assess the respondent's benefits under the CBA as follows:
 - a. Gratuity.....Kshs.257,894.00
 - b. Leave.....Kshs.11,568.00
 - c. Notice.....Kshs.95,222.40

Kshs.394,684.40

Less paid Sacco loan and

Sum paid to the account Kshs.149,658.00

Net Kshs.215,026.40

There is evidence that the employer paid Kshs.40,672.00 to respondent's Sacco to clear loan and a further Kshs.108,986.00 as net of terminal dues . The deducted Kshs.119,806.00 as salary advance has not been justified. Therefore I will not take into account that sum. In any case no counterclaim was filed and proved on that figure.

Compensation for unfair termination

54. The trial court found that the termination of the respondent's employment was done unfairly but said nothing about the prayer for compensation under section 49 of the *Employment Act*. The failure to make a determination was an error in law because the court had a duty to make a determination.
55. The respondent in her appeal No.E010 of 2022 has prayed for the matter of compensation to be sent back to the trial court for determination. However vide the written submissions filed herein, the respondent asked this court to award compensation for unfair termination and assess the amount payable.
56. Sending the file back to the lower court will be a disservice to the parties. The records of appeal contain sufficient evidence for a determination to be made on that issue.
57. Having already made a finding of fact that the termination of the respondent's employment was unfair, the law donates discretion to me to award the employee compensatory damages. The respondent served the appellant for 13 years before the unfair termination. She deserves a good quantum of compensatory damages for the long service. However since she contributed to the termination through her misconduct and had unapologetically intended to exit to pursue a new career in politics, I award her gross salary for six months for the unfair termination equaling to Kshs.142,833.40.

Conclusion and Disposition

58. I have found that trial court erred by failing to analyze and give reason for some of the conclusions he made in the impugned judgment. I have further found that the trial court erred in awarding the



respondent the sum of Kshs.1,040,583.52 as terminal dues under the CBA. I have also found that the trial court erred by failing to grant and assess compensation for unfair termination as permitted under Section 49 read with Section 50 of the *Employment Act*. Based on the said findings, both appeals were successful to the extent highlighted above. Consequently, I set aside the impugned judgment by the subordinate court and substitute there with an order directing the appellant to pay the respondent the following:-

- a. Dues under the CBA.....Kshs.215,026.40
- b. ompensation.....Kshs.142,833.60
Kshs.357,860.00
- c. The order on certificate of service, costs and interest by the lower court remains unchanged.
- d. Since both appeals herein were successful each party shall bear own costs of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 13TH DAY OF APRIL, 2023.

ONESMUS N MAKAU

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 April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

