



REPUBLIC OF KENYA



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Bonito Hotels & another v Museywa (Employment and Labour Relations Appeal E008 of 2022) [2023] KEELRC 3479 (KLR) (4 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 3479 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E008 OF 2022**

JW KELI, J

MAY 4, 2023

BETWEEN

BONITO HOTELS 1ST APPELLANT

TOURIST HOTEL BUNGOMA 2ND APPELLANT

AND

GERISHOM SALAMO MUSEYWA RESPONDENT

(Appeal against the entire judgment of Hon. C.A.S Mutai (SPM) delivered on the 25th February 2022 in Bungoma CM ELRC Cause No. 12 of 2019)

JUDGMENT

1. The Appellant being dissatisfied by Judgement of Hon. CAS Mutai (SPM) delivered on the 25th February 2022 in Bungoma CM ELRC Cause No. 12 of 2019 filed Memorandum of Appeal dated 25th march 2022 against the entire decision seeking that the appeal be allowed and the judgment of the lower court dated 25th February 2022 be set aside.
2. The appeal was premised on the following grounds:-
 - 1) That the Learned Magistrate erred in law and fact in holding that there was breach of the contract of service by the appellants
 - 2) That the Learned Magistrate erred in law and fact in holding that even if the appellants were constrained there was need to convene proceedings with due regard to the wages earning under section 66 of the [Employment Act](#).
 - 3) That the Learned Magistrate erred in law and fact in granting both Orders of severance pay and NSSF.



- 4) That the Learned Magistrate erred in law and fact in granting the Respondent Kshs. 192, 192.80 for unpaid rest dues against the admission by the respondent that none were remaining and evidence produced by the appellants in support of the same.
- 5) That the Learned Magistrate erred in law and fact in awarding the respondent compensation for the unfair termination against the admission of the respondent that he was never terminated by the appellants.
- 6) That the Learned Magistrate erred in law and fact in faulting the appellants for not producing any evidence in support of the claim that it was experiencing financial constraints thus the review of the salary.
- 7) That the Learned Magistrate erred in law and fact in failing to evaluate the evidence in its totality and in failing to take into consideration submissions and authorities submitted by the appellants thereby arriving at a wrong conclusion.

Background to the Appeal

3. The Respondent/Claimant sought before the magistrate court the following reliefs:-
 - a. A declaration that the termination of employment was discriminative, malicious, unlawful, unfair, unprocedural and a fundamental violation of the rights of the claimant.
 - b. A declaration that the claimant was entitled to housing allowance
 - c. A maximum compensation as per section 49(e) of the *Employment Act*
 - d. An order that the respondents pay the claimant as per paragraph 13 herein above
 - e. A certificate of service as per section 51 of the *Employment Act*
 - f. Costs and interests of the suit
 - g. The claim to be allowed on its entirety
 - h. Any other relief and or further relief this honourable court deems fit and just to grant (page 7).
4. The trial magistrate Hon. CAS. Mutai (SPM) in his Judgment delivered on the 25th February 2022 entered judgment for the claimant against the respondent / appellant in the following terms:-
 - a. Payment in lieu of notice – Kshs. 16761/-
 - b. Severance pay Kshs 30,030.13
 - c. Compensation for unfair termination Kshs 201,132/-
 - d. Unpaid rest days Kshs 192,192.80
 - e. NHIF remittances for 45 months worked Kshs 17,200/-
 - f. NSSF remittances for 45 months worked Kshs 17,200/-

Hearing

5. The court directed that the appeal be canvassed by way of written submissions. The Appellants' written submission's drawn by Agutu & Co., Advocates were dated 2nd March , 2023 and received in court on the 10th march 2023. The Respondent represented by firm of Ndalia & Co. Advocates did not file



written submissions as at time of writing the decision despite extension of time to file by 14 days on the 13th April 2023.

Determination

6. The principles which guide this court in an appeal from a trial court are settled in *Selle and another v Associated Motor Boat Company Ltd & others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a 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 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 to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

7. Further in *David Kaburuka Gitau & Another v Nancy Ann Wathithi Gatui & Another* Nyeri HCCA No. 43 of 2013 the court opined:-

“It is now settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its findings and conclusions.”

Issues for determination

8. The Appellants in their submissions identified the following issues for determination in the appeal:-
- a. Whether the respondent deserted his employment without notice or was unfairly dismissed by the appellants
 - b. Whether the respondent was entitled to house allowance
 - c. Whether the respondent was entitled to payment of leave allowance
 - d. Whether the respondent is entitled for payment of unpaid rest days and public holidays
 - e. Whether the respondent was entitled to severance pay
 - f. And whether the respondent was entitled to claim for NHIF and NSSF remittance.
9. The court will adopt the issues raised by the appellant in the determination of the appeal which it found relevant to the grounds of appeal.

Whether the Respondent Deserted His Employment Without Notice or Was Unfairly Dismissed by the Appellants

10. The appellants submit that evidence before the trial magistrate court was that the appellant did not terminate the employment of the respondent but the claimant deserted duty on the 1st June 2019 stating he could not imagine being paid 10,000 salary of maid. (page 45 of- the record)
11. The respondent did not file submissions in response.



Decision

12. The claimant during cross-examination stated he was not issued with letter of termination, that in 2019 the company was facing challenges and proposed pay cut, that they had a discussion and he wrote a letter and declined the pay cut, that he received a letter on the pay cut of which he wrote that he had declined the pay cut. That he was working waiting to be paid benefits (page 32 of the record is the letter). The claimant told the court that he did not resign formally. In the judgment it is recorded he made it clear in written letter he would not accept the pay cut proposal and would stay at work waiting for payment of terminal dues. That he took off and left the respondent employment as he felt offended by the pay cut decision to review his salary and confirmed at cross examination when he said that he was a professional and he could not do work of a house help (page 45 of the record of appeal.)
13. In the judgment the court the issue did not factor the recorded evidence of the claimant but stated that DW1 did not indicate there was a letter disclosing the claimant was leaving employment. The court finds that the evidence stated by the Hon. Trial Magistrate was not reflected in the proceedings of the court putting this court in a dilemma.
14. The court had to evaluate the evidence and arrive to at its own conclusion on the issue. The court finds during the cross examination it was recorded the claimant was not given termination letter and further stated he never resigned formally. DW1 stated he was there when the claimant was leaving and there was no termination letter. The trial court did not make its decision on this issue. The appellant relied on the decision in *Catherine Moraa Omwansa v Catherine Moraa Omwansa* (2019) eKLR (the parties in the case were Catherine Moraa Omwansa v Mr. and Mrs. Hussein Dado) where Justice O.N. Makau considered issue of desertion and unfair termination as follows:-

- “17. Under section 47(5) of *Employment Act*, the burden of proving unfair termination lies with the employee who alleges that she was so terminated. In this case, the respondents have denied the alleged unfair termination of the claimant’s employment and averred that it is the claimant who deserted them at the hour of need.
18. I have carefully considered the evidence tendered. The claimant’s written statement is to the effect that she was dismissed and frog marched out of the premises by the second respondent. In her sworn testimony in chief, she stated that she was dismissed by the first respondent for demanding a salary increment and during cross examination she stated that she was dismissed on Thursday 6.10.2012 at 5.30 pm.
19. The said contradiction regarding the person who dismissed the claimant can only lead to the inference that the claimant is not telling the truth. The foregoing view is fortified by the fact that 6.10.2012 was not on a Thursday but Saturday. Consequently, I find and hold that the claimant has not proved on a balance of probability that she was dismissed by the respondents on 6.10.2012 but she deserted without notice.”

The court finds the authority is on different facts as in the instant case the claimant’s employment was not terminated as per DW1 evidence. It is the duty of the employer to provide prove of fair process of separation with the employee. The claimant provided prove he rejected the pay cut and stated he would work waiting for payment of his dues(page 32).



15. The reasons for termination must be proved by the employer under section 43 read with section 45 of the *Employment Act*. Section 45 reads:-

“Unfair termination

- (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.”

The reason given by the respondent of desertion of work by the claimant was not supported by any evidence. The appellant relied on the write up by the court in its decision which the court finds was not evidence as the same was not recorded in the proceedings. A letter of notice of intention to terminate and invitation for hearing on the reason on basis of desertion by the claimant would have been helpful and in compliance with section 41 of the *Employment Act*. The court finds on a balance of probabilities and going by the evidence as summarized by the trial court the claimant’s services were not terminated formally but he rejected the pay cut which the employer proposed. In his letter referring to meeting of 2nd January 2019 meeting the claimant stated:-

“ I hereby write this note on the meeting you had on 2/1/2019 on the issue of pay cut, I say thank you the passed four years we have been together , I therefore not go by the said pay cut and therefore I will remain faithfully as work until my dues will be remitted.”

(page 32 reproduced verbatim). The court finds that this was uncontroverted evidence before the court that the claimant would continue working awaiting payment of his dues.

16. The court is of the opinion that the employee cannot be forced to take a pay cut and the only option, if the employee like the claimant rejects the pay cut, is for the employer to invoke separation process with employee on account of incapacity to pay wages either vide redundancy where appropriate or declare insolvency if a company under section 67 of the *Employment Act*. Termination for misconduct like desertion of duty would be under section 41 of the *Employment Act* to wit:

“

- “41. Notification and hearing before termination on grounds of misconduct
- (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."

The employer did not provide prove of insolvency or the financial difficulty and there was no procedural due process as per section 41 of the *Employment Act* carried out after the alleged desertion. Even if the claimant left as alleged then the termination process under section 41 of the *Employment Act* ought to have been complied with. The court upholds the finding on unfair termination by the magistrate court.

Whether the Respondent Was Entitled to House Allowance

17. The court finds that under the judgment of the magistrate court there was no award on housing allowance hence the issue is misplaced (page 47.) There is no cross appeal and hence the court finds it is in futility to address an issue not in the judgment of the lower court and not cross appealed on.

Whether the Respondent Was Entitled to Payment of Leave Allowance

18. The court finds that under the judgment of the court there was no award on leave allowance hence the issue is misplaced (page 47.) There is no cross appeal and hence the court finds it is in futility to address an issue not in the judgment of the lower court and not cross appealed on.

Whether the Respondent Was Entitled for Payment of Unpaid Rest Days and Public Holidays

19. The magistrate court awarded unpaid rest days for Kshs. 192,192.80. There was no explanation in the judgment of the court of the basis of the award. This calls for the court sitting at appeal to evaluate the evidence and reach its own conclusion as guided in *Selle and Another v Associated Motor Boat Company Ltd & others*, [1968] EA 123 (*supra*).
20. The appellants submit that the respondent in statement of claim prayed for award of rest days and public holidays pay, (page 6). That during cross-examination the respondent confirmed to the court he used to go for rest days (off days including public holidays).

The position was corroborated by evidence of the appellant demonstrating the respondent took rest days and public holidays (page 26-31) It was recorded in the lower court proceedings during the claimants cross- examination as follows:-

“in a week I used to go for off for 1 day . On public holiday we never used to go on a day off.”

21. The *Employment Act*, 2007 under section 27 provides for at least 1 rest day in every seven days as follows:-

“27



- (1) An employer shall regulate the working hours of each employee in accordance with the provisions of this Act and any other written law.
- (2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days."

The claimant admitted during cross-examination that:-

"in a week I used to go for off for 1 day."

22. The court holds that the Hon. Trial Magistrate erred in law and fact by awarding unpaid rest days when the claimant admitted during cross-examination that he took one day off weekly which was in compliance with the provisions of section 27(2) of the Employment Act which states:-

"(2) Notwithstanding subsection (1), an employee shall be entitled to at least one rest day in every period of seven days."

The claimant got his 1 day off weekly as per the law hence the award for unpaid rest days was illegal and is hereby set aside in its entirety.

Whether the Respondent Was Entitled to Severance Pay

23. The appellant stated that there was evidence of registration with NSSF by the claimant hence the award of severance was not justified. The appellant relied on the provisions of the Employment Act section 35 which reads:-

- (5) 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.
- (6) 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."

The court agrees with the appellant that the claimant having been under NSSF was not entitled to payment of service pay. The court further notes that severance pay is only payable in case of redundancy under section 40 (1)(g) of the Employment Act which reads:-

"(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service."

The court finds that there was no evidence before the court that the claimant had been declared redundant by the employer. The award for severance pay is set aside.



Whether the Respondent Was Entitled to Claim For NHIF and NSSF Unremitted Amount .

24. The claimant sought payment of unremitted NSSF and NHIF deductions for 43 months (page 7) . The court awarded NHIF and NSSF remittances for 45 months worked. The court finds, on face value the Hon. Magistrate erred in law and fact by awarding for 45 months when the claim was for 43 months. A party cannot be awarded claims outside their pleadings. The appellant submits that other than the claim there was no supporting evidence of the non - remittance. The court finds on this issue the burden shifted upon the allegation of non- remittance to the appellant as custodian of employee records under section 74 of the Employment Act to prove remittance of the dues and which they failed to. Section 74 stated:-

“74. Records to be kept by employer

- (1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—
 - (a) of a policy statement under section 6(2) where applicable;
 - (b) specified in section 10(3);
 - (c) specified in section 13;
 - (d) specified in sections 21 and 22;
 - (e) of an employee’s weekly rest days specified in section 27;
 - (f) of an employee’s annual leave entitlement, days taken and days due specified in section 28;
 - (g) of maternity leave specified in section 29;
 - (h) of sick leave specified in section 30;
 - (i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;
 - (j) of food rations where applicable;
 - (k) specified in section 61;
 - (l) of a record of warning letters or other evidence of misconduct of an employee; and
 - (m) any other particulars required to be kept under any written law or as may be prescribed by the Minister.”



25. The deductions and remittances of NSSF and NHIF would fall under section 21 of the *Employment Act* which reads:-

“ 21. Statement of statutory deductions

- (1) A pay statement issued in accordance with section 20 need not contain separate particulars of statutory deductions i —
 - (a) it contains an aggregate amount of statutory deduction, including that deduction; and
 - (b) the employer has given to the employee, at or before the time at which the pay statement is given, a statement of statutory deductions specified in subsection (2).
- (2) A statement of statutory deductions shall be —
 - (a) in writing;
 - (b) contain, in relation to each deduction comprised in the aggregate amount of deductions, particulars of —
 - (i) the amount of the deduction;
 - (ii) the intervals at which the deduction is to be made; and
 - (iii) the purpose for which it is made; and
 - (c) in accordance with subsection (5), effective at the date on which the pay statement is given.”

26. The court holds that it is not for the claimant to make a claim to be paid the said unremitted dues even if true as they are due to a statutory body. The said statutory bodies have mechanisms of pursuing the dues from the employer under their enabling laws. The court then find and determines the Hon . Magistrate had no jurisdiction to make the awards for payment of unremitted NHIF and NSSF dues to be paid to the claimant and the awards are set aside. The court on remedies ought to be guided by section 49 of the *Employment Act*.

27. In the upshot the court upholds the finding of unfair termination and upholds the compensation for unfair termination which is justified considering it amounted to approximately 6 months salary @ 35000 per month (page 15 is payslip), the length of service of 4 years and the termination having been unfair. The award of compensation pay of Kshs. 201,132 is upheld. The notice in liue was not challenged in the appeal. The court did not find reason to disturb the notice pay award.

28. In conclusion the judgment of Hon. Charles Soi Mutai (SPM) delivered on the 25th February 2022 in Bungoma CM ELRC Cause No. 12 of 2019 is set aside and in its place substituted as follows:-

The court enters judgment for the claimant against the respondent as follows:-

1. A declaration is hereby issued that the termination of the employment of the claimant was unlawful and unfair.,



2. Payment in lieu of notice for the sum of Kshs. 16,761/- .,
 3. Award for compensation for the unfair termination of employment for Kshs. 201,132/= .,
 4. Interest at court rates from date of judgment of the trial court of 25th February 2022 until payment in full and;
 5. Costs of the suit.
29. The appeal was partially successful. In the circumstances the court makes no order as to costs.
30. It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF MAY 2023.

JEMIMAH KELI

JUDGE

In the presence of :-

Court Assistant: Lucy Macheso

Appellant : Ms. Awour h/b Agutu

Respondent: Ms. Komora

