



**Otieno v Kanji V. Kerai t/a Gaatrad Enterprises (Appeal
E28 of 2021) [2023] KEELRC 1308 (KLR) (4 May 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1308 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E28 OF 2021
NZIOKI WA MAKAU, J
MAY 4, 2023**

BETWEEN

JAPHETH AMBWATA OTIENO APPELLANT

AND

KANJI V. KERAI T/A GAATRAD ENTERPRISES RESPONDENT

*(Being an appeal against the Judgment of Hon. P. Muholi (Mr) S.R.M.
issued on 17th February 2021 in Nairobi CMEL No. 688A of 2018)*

JUDGMENT

1. The Appellant filed this appeal against the Judgment of Hon P Muholi (Mr) SRM issued on 17th February 2021 in Nairobi CMEL No 688A of 2018, Japheth Ambwata Otieno v Kanji V Kerai T/ A Gaatrad Enterprises. The Memorandum of Appeal dated 12th March 2021 set out the following grounds:
 - i. That the learned trial magistrate erred in fact and law in being satisfied that on a balance of probability the appellant had not proved a case of wrongful and unfair termination.
 - ii. That the trial magistrate erred in fact and in law in finding that the appellant had not proved his case against the Respondent whereas there was overwhelming evidence to the contrary.
 - iii. That the trial magistrate erred in fact and in law by disregarding the claimant's evidence, submissions and authorities relied upon thus arriving at an erroneous decision.



- iv. That the learned magistrate erred in fact and in law by failing to award House allowance and compensation in the suit below.
2. The Appellant seeks for Orders that the Appeal be allowed and the said Judgment of the Subordinate Court be enhanced. He prays further, that the Honourable Court enters judgment against the Respondent for: a declaration that the Appellant's termination from employment was wrongful and unfair; the Appellant be paid house allowance and 12 months' compensation as tabulated in the statement of claim dated 18th December 2018; costs of this appeal; and interests on the aforementioned.
3. The appeal was disposed by way of written submissions.

Appellant's Submissions

4. On ground 1, the Appellant submits that the Trial Court having made a finding that the termination on account of redundancy was not procedural (page 77 of the Record), it ought to have made an award for payment of damages of 12 months' compensation for wrongful and irregular termination. On ground 2, he submits that in holding that the Appellant was only entitled to leave days, notice pay and severance pay and that the other prayers sought for are not applicable under termination by redundancy, the Learned Magistrate disregarded all evidence as placed before him to wit:
 - a. Sample pay slips at pages 16 and 17 of the Record showing the Claimant was not paid house allowance.
 - b. Proceedings at trial at page 89 of the Record where the Claimant confirmed on cross-examination that his salary was not inclusive of house allowance.
 - c. The employer admitted on cross-examination that it did not issue the Claimant with a contract upon employing him. (page 91 of the Record)
 - d. Submissions on house allowance at pages 64 and 65 of the Record.
 - e. The Appellant availed a muster roll he used to fill while in the employ of the Respondent at pages 46 of 56 showing that he reported at work even during public holidays.
5. The Appellant submits that had the Learned Magistrate considered the evidence, submissions and the authorities presented before him by the Claimant at trial, the Court would have reached a very different conclusion. That the Trial Court erred in dismissing the claim for house allowance and compensation without advancing any reasons whatsoever. In this regard, the Appellant urges this Court to borrow the mode of computation of house allowance adopted by the Court of Appeal Judges in *Grain Pro Kenya Inc. Ltd v Andrew Waitbaka Kiragu* [2019] eKLR where the Court adopted 15% as a reasonable percentage in calculating house allowance.

Respondent's Submissions

6. It is the Respondent's submission that there is a plethora of authorities setting out the principles that guide the court on a first appeal. That the court of Appeal in the case of *Mwangi v Wambugu* [1984] KLR 453 pronounced itself as follows:

“A court of Appeal will not normally interfere with a finding of fact by the trial court unless such finding is based on no evidence or on a misapprehension of evidence or the Judge is shown demonstrably to have acted on wrong principle in reaching the finding ...”



7. The Respondent submits that the award by the Honourable Magistrate was in accordance to the pleadings and the testimony of the Claimant, which supported the claim for redundancy under section 40 of the *Employment Act*. The Respondent submits that the Trial Court agreed with the Labour Officer that this was a termination through redundancy under section 40 of the *Act* and subsequently computed the payment of leave days, notice pay and severance pay as set out under section 40(1)(e) to (g). That the Appellant has not demonstrated how the Learned Magistrate misapprehended evidence, demonstrably acted on wrong principles, and or failed to take into account any material points or circumstances. The Respondent urges this Court to dismiss the Appeal with costs.
8. In an appeal such as this, a Court has to consider the evidence adduced, re-evaluate the same and upon analysis of the same, as well as the law make a determination based on the material before it. Nevertheless, an appellate court must be cognisant and alive to the fact that it neither saw nor heard the witnesses who testified, unlike the trial court. In the case before the Learned Senior Principal Magistrate, the Appellant was awarded severance pay of Kshs 109,038/- as well as notice pay of Kshs 27,000/- plus costs which were assessed at Kshs 63,575/-.
9. There was no error in ascertaining that the Appellant was not entitled to house allowance, pay for public holidays etc as in the view of this Court, when a party acquiesces to the denial of pay such as the Appellant did in respect of those sums, there is only anguish and the gnashing of teeth. As the appeal is unsuccessful it is dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF MAY 2023

NZIOKI WA MAKAU

JUDGE

