



REPUBLIC OF KENYA



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

**Radar Limited v Machera (Appeal E061 of 2022)  
[2023] KEELRC 1918 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1918 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E061 OF 2022**

**M MBARÚ, J  
JUNE 29, 2023**

**BETWEEN**

**RADAR LIMITED ..... APPELLANT**

**AND**

**DANIEL JOMO MACHERA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. D. O. Mbeja, Principal Magistrate delivered on 24 August 2022 in Mombasa CMELRC No. E045 of 2020)*

**JUDGMENT**

**\*\*\*ARGUMENTS**

1. The background to the appeal is a claim filed by the respondent in the lower court Mombasa CMERLC No. E045 of 2020 on the grounds that on 1st May 2020 his employment was terminated by the appellant herein as the employer which was unfair and unlawful and he claimed payments of leave days, public holidays, house allowances, severance pay, gratuity and compensation.
2. In response, the appellant's case was that the respondent's wage was regulated under the Wages (General) (Amendment) Orders for each year of service and the claims made were not justified since employment terminated upon notice as agreed by the parties.
3. In his judgment, the learned Magistrate made a finding that there was unfair termination of employment and awarded the respondent all claims save for severance and gratuity pay. The total amounting to Kshs. 517,629.56 for unpaid leave days, house allowances, public holidays and compensation.
4. Aggrieved by the judgment, the appeal is on the grounds that the award for leave days was erroneous since the respondent would take his annual leave and there was no prove that he was at work during public holidays. The paid salary was inclusive of a house allowances and the requirement to pay the



same is an error. The award made should be subjected to statutory deductions and the award of interests is in error and the appeal should be allowed and the judgment set aside.

5. Both parties attended and agreed to address the appeal by way of written submissions. These are put into account and this being a first appeal, the court is required to reconsider the evidence and findings of the lower court and arrive on its own findings.
6. Before the trial court, the respondent testified that he was employed by the appellant on 1st February, 2013 as a night guard earning Kshs. 18,657 per month and he worked until 1st May 2020 when he was given notice terminating his employment with effect from 1st June 2020. His claim was that he was not given any reasons as to why his employment was terminated but he was told that there was no work for him and his colleagues.
7. The record includes letter dated 1st May 2020 being Notice of Termination of employment with effect from 1st June 2020 on the grounds that due to economic hardships facing the Company and the country in general, you have been terminated for the following reasons: - Recent economic conditions have caused a significant downturn in sales, necessitating restructuring at Radar Ltd.
8. In terms of Section 40 of the *Employment Act*, 2007 an employer who is faced with an economic and operational matter is allowed to restructure. In the process, this may lead to termination of employment. The respondent was issued with a one-month notice and given the reasons for the restructuring and the need to terminate employment due to the economic hardships facing the appellant.
9. A keen look at the notice issued is partially lawful since it largely complies with the law, Section 40 of the *Employment Act*, 2007 save, the respondent as an employee was not unionised as his payment statement does not have any trade union dues deductions and so, the notice terminating employment ought to have been copied to the County Labour Officer as held in *Africa Nazarene University v David Mutevu & 103 others* [2017] eKLR that;

... where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy

10. And in the case of *Thomas De La Rue (K) Ltd vs David Opondo Omutelema* [2013] eKLR the court in interpreting the provisions of Section 40(1) (a) and (b) of the *Employment Act*, 2007 held that the effect that both required different kinds of notices;

It is quite clear to us that sections 40 (a) and 40 (b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer. Section 40 (b) does not stipulate the notice period as is the case in 40 (a), but in our view, a purposive reading and interpretation of the statute would mean the same notice period is required in both situations. We do not see any rational reason why the employee who is not a member of a union should be entitled to a shorter notice.



11. It is therefore not sufficient that the appellant has a justified reason to terminate employment or that the contract of employment allowed issuance of notice or payment in lieu thereof, where the reasons related to a redundancy, then notices required under the law ought to have issued which is lacking in this case.
12. The trial court made findings that all other claims succeeded save for payment of severance pay. Without adhering to the mandatory provisions of Section 40 of *Employment Act*, 2007 such remedy was available to the respondent but he has not lodged a cross appeal.
13. The reasons leading to termination of employment being justified, save for want of due process, compensation as a remedy should have taken this into account. The claim for 12 months' compensation in terms of Section 45(5)(2)(b)(ii) of the *Employment Act*, 2007 should have been put into account. A blanket award of 12 months' compensation is without giving any reasons as to why the higher limit was applied and in this case is not justified and to this extent, he appeals must succeed.
14. The respondent worked for the appellant from the year 2013 to 2020 and the reasons leading to termination of employment were purely operational. It had nothing to do with a disciplinary matter and an award of three months' compensation based on the last gross wage of Kshs. 18,657 all at Kshs. 55,971 is hereby found appropriate.
15. Notice terminating employment was issued and there is a record to this effect. Further payment is not necessary.
16. On the claim for unpaid leave days from February 2012 to February 2020 and prorated leave pay until May 2020 without the appellant submitting any work records to demonstrate how the respondent enjoyed his right to take annual leave each year in terms of Section 28 of the *Employment Act*, 2007 such pay is due save under Section 28(2) such taken leave days only go back up to 18 months unless the employee can demonstrate this was applied for but approved or declined by the employer. On the wage of Kshs. 18,657 for 18 months, the respondent taken leave pay should be 27, 985.50.
17. The enjoyment of public holidays is lawful and a legitimate claim. The respondent did a chronology of such days in his Memorandum of Claim quantified at Kshs. 50,230.60 and the findings by the learned magistrate in this regard cannot be faulted.
18. With regard to the claim for house allowances, the record does not include the letter of employment to demonstrate how rights under Section 31 of the *Employment Act*, 2007 with regard to housing or payment of a house allowance was to be treated. The respondent too has not gone into the details as to how much the initial wage was from the year 2013 until the year 2020 when his employment was terminated while earning a monthly wage of Kshs. 18,657. I take it this was the provided wage throughout the period of employment.
19. Under the Minimum Wage Orders, in the year 2013 the wage was Kshs. 10,911.70 and the respondent was earning way above such rate and to pay a house allowance over such wage would amount to unjust enrichment.
20. In the year 2020 the wage applicable as at 1st June 2020 was Ksh. 15,141.95 while the respondent was earning ksh. 18,657 per month.
21. The award of house allowance is not justified and the appeal is allowed to this extent.
22. In employment and labour relations proceedings, the award of costs, interests and or conditions on the same is purely discretionary and subject to Section 12(4) of the *Employment and Labour Relations Court Act*, 2011. Unless there is a demonstration that such discretion has not been applied judicially,



this court will respect the findings by the trial court to award. It should however be noted that where the employer has largely met the conditions necessary with regard to termination of employment in terms of Section 45(5) of the *Employment Act*, 2007 particularly that the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision was followed, the award of costs should not be necessary. proceedings of this nature are not meant to remove the employee from his ordinary lifestyle but taking into account that due to the conduct of the employer, legal proceedings were necessary. Such balance of rights is necessary. A 50% of costs for the lower court and this appeal is found appropriate.

23. The last issue is payment of statutory deductions. Whether this is addressed directly in the judgment of the court, Section 49(2) of the Act is mandatory for every employer to make a statutory deduction of all payments made to an employee.
24. Accordingly, the appeal is partially successful and the judgment in Mombasa CM ELRC No. E045 of 2020 is allowed in the following terms;
  - a. Compensation Kshs. 55,971;
  - b. Leave pay Kshs. 27,985.50;
  - c. Public holidays Kshs. 50,230.60;
  - d. 50% of costs at the lower court;
  - e. Awards above shall be subject to Section 49(2) of the *Employment Act*, 2007.
  - f. For the appeal, each party shall bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

