



REPUBLIC OF KENYA



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

Ogwedhi Propeties Ltd t/a Vittoria Suites Kisumu v Abuya (Appeal E043 of 2022) [2023] KEELRC 1481 (KLR) (21 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1481 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E043 OF 2022**

S RADIDO, J

JUNE 21, 2023

BETWEEN

OGWEDHI PROPETIES LTD T/A VITTORIA SUITES KISUMU ... APPELLANT

AND

DIDACUS OLAMBO ABUYA RESPONDENT

(Being an Appeal from the judgment and decree of the Chief Magistrate's Court at Kisumu by Hon K. Cheruiyot, SPM on the 10th June 2022)

JUDGMENT

1. Didacus Olambo Abuya (the Respondent) sued Ogwedhi Properties Ltd (the Appellant) before the Senior Principal Magistrates Court alleging unfair termination of employment and breach of contract.
2. In the Statement of Claim, the Respondent prayed for:
 - (1) A declaration that the termination of the Claimant's employment was malicious, unlawful, unfair, unprocedural and fundamental violation of the Claimant's right.
 - (2) The sum of Kshs 3,045,380.09 as tabulated below.
 - (3) Certificate of Service as per section 59 of the [Employment Act](#).
 - (4) Interest on (2) above at court rates from the date of termination of employment.
 - (5) Cost of the suit.
 - (6) Any other award as the Honourable Court deems to grant in the circumstances of this claim.
3. The Respondent set out the computations immediately after the prayers.



4. The Cause proceeded to a hearing and in a judgment delivered on 10 June 2022, the Senior Principal Magistrate ordered:
Consequently, I enter judgment for the Claimant against the Respondent as prayed in the Memorandum of Claim.
5. The Appellant, being aggrieved lodged a Memorandum of Appeal with the Court on 6 December 2022 (leave was granted on 24 November 2023) contending that:
 - (1) The learned trial Magistrate erred in fact and law in failing to find from evidence on record that there was a document of engagement that regulated the terms and conditions of service between the Appellant and the Respondent.
 - (2) The learned trial Magistrate erred in law by totally ignoring the effect of the contract of service as the document to give effect to in construing the terms and conditions of service.
 - (3) The learned trial Magistrate erred in fact and in law by failing to take into account the terms and conditions of service with specific reference to commission payable in a service contract.
 - (4) The learned trial Magistrate erred in law by failing to appreciate the evidence and submissions by the Respondent with specific reference to leave capable of being awarded thus arriving at a wrong decision.
 - (5) The learned trial Magistrate misdirected himself in making a finding that the Respondent herein was entitled to commission based on expected revenues without proof of achievement of targets.
 - (6) The learned trial Magistrate erred in law in evaluation of the evidence and the effect of the principle of balance of probability in relation to managing separation in service contract with reference to substantive and procedural fairness in managing separation.
 - (7) The learned trial Magistrate erred in fact and law by failing to appreciate the evidence tendered by both the Appellant and Respondent and analyse and apply the correct law thereby arriving at erroneous conclusion that is not premised on evidence and the law in respect to management of separation on service contract to wit section 41 and 45 of the *Employment Act*, 2007.
6. The Appellant filed the Record of Appeal on 14 February 2023, and the Court gave directions on 16 March 2023.
7. The Appellant filed its submissions on 18 April 2023.
8. On the same day, the Appellant filed a Motion under a Certificate of Urgency seeking leave to file a Supplementary Record of Appeal.
9. The Court directed the Appellant to serve the Motion and on 8 June 2023, the parties informed the Court that they had a consent.
10. The Court directed the parties to file the consent and it was filed. The terms of the consent were:
 - (1) The application dated 18/4/2023 be and is hereby allowed.
 - (2) The appellant to include the order extending time for appeal in Kisumu ELRC Misc No. 56 of 2020 (sic) in the Supplementary Record of Appeal.
 - (3) The Respondent to file submissions before close of business of 8/6/2023.



11. The Respondent filed his submissions on the same day.
12. The Court has considered the Record of Appeal, Supplementary Record of Appeal and submissions.
13. Before addressing its mind to the Grounds of Appeal, the Court expresses its concerns about the mode of entering judgment as prayed in the Memorandum of Claim.
14. Such a course does not accord with the basic elements of a judgment writing nor the course of justice. A judgment should succinctly set out the issues in dispute/for adjudication and address each issue apiece.

Unfair termination of employment

15. The Appellant challenged the Senior Principal Magistrate's finding on unfair termination of employment in Grounds 6 and 7 of the Memorandum of Appeal.
16. In concluding that the termination of the Respondent's employment was unfair, the Senior Principal Magistrate noted that the Appellant had not produced minutes of the disciplinary hearing to show the persons present and, therefore, it had failed to justify the termination in terms of section 47(5) of the [Employment Act, 2007](#).
17. The Court has relooked at the proceedings before the Senior Principal Magistrate and the following emerge.
18. The Appellant suspended the Respondent from work on 15 March 2019 for a week. The Respondent was instructed to report back on 22 March 2019. The suspension was to allow further deliberations on the Respondent's conduct.
19. On 16 March 2019, the Appellant wrote to the Respondent to notify him of the termination of his employment with immediate effect. The reasons given were those outlined in the suspension letter (cancelling a booking and failing to inform the tam of a confirmed booking). The Appellant asserted in the letter that the Respondent had refused to accept the suspension letter and that he was serving a final warning.
20. In a letter dated 8 April 2019, the Respondent acknowledged that he had declined to receive the suspension letter because the reasons therein were false.
21. The Appellant had in the suspension letter indicated that it would deliberate on and decide on the Respondent's fate within a week. That was not to be because of the intervening circumstances.
22. Section 35(1)(c) of the [Employment Act, 2007](#) envisages a written notice of termination of employment at least 28 days in advance if the employee is paid by the month (unless it is a case of summary dismissal).
23. The Appellant did not issue such a notice to the Respondent. The suspension letter did not inform the Respondent in unequivocal terms that the termination of his employment was under consideration. The letter did not call upon him to respond to the allegations or that a disciplinary hearing was contemplated.
24. In other words, the suspension letter did not constitute a show-cause as envisaged under section 35(1)(c) of the [Employment Act, 2007](#).
25. Further, the termination letter sent to the Respondent indicated that the termination was with immediate effect, meaning that it was a summary dismissal.
26. By dint of section 41(2) of the [Employment Act, 2007](#), an employer must hold an oral or physical disciplinary hearing in cases of summary dismissal.



27. The Appellant did not disclose how, when and whether the Respondent was invited to a disciplinary hearing between 15 March 2019 and 16 March 2019.
28. Minutes of such a hearing were not placed before the trial Court. The details of those who attended the hearing were not disclosed.
29. This Court holds that the Senior Principal Magistrate was right to find that the termination of the Respondent's employment was unfair.
30. After finding that the termination of the Respondent's employment was unfair, the Senior Principal Magistrate awarded the maximum compensation as pleaded by the Respondent.

Award of compensation

31. The Appellant did not expressly challenge the award of compensation but the Respondent made it an issue for the Court's determination in his submissions.
32. The Senior Principal Magistrate did not give any reasons for awarding the compensation as pleaded.
33. Section 49(4) of the *Employment Act*, 2007 contemplates the Court setting out the factors or reasons for assessing compensation.
34. The Senior Principal Magistrate fell into error in not giving out the reasons for assessing the compensation.
35. The Respondent served the Appellant for about 4 years and in consideration of the length of service, this Court is of the view that the equivalent of 5 months' gross wages as compensation would have been appropriate.
36. The Court, therefore, vacates the maximum compensation with substitutes it with an award equivalent to 4 months' gross salary (as compensation).

Commission

37. Grounds 2, 3 and 5 spoke to the award of commission.
38. The Respondent made a pitch for the payment of Kshs 2,258,380/- as sales commission from 1 July 2017 to 28 February 2019. The Senior Principal Magistrate allowed the head of the claim as prayed.
39. The Appellant's testimony before the Senior Principal Magistrate was that the contract did not provide for the payment of a commission.
40. The Court has looked at the evidence before the subordinate Court. The Respondent's first contract dated 26 November 2015 provided for the payment of commission.
41. When the contract expired, the parties entered into a fresh contract on 29 February 2016 (new management) and the contract did not include the payment of commissions.
42. However, on 26 July 2016, the Appellant set performance targets for the Respondent.
43. Under the targets, the Respondent was to earn 0.35% commission on achievement of targets and 2.5% on exceeding the targets.
44. The Respondent pleaded that he was entitled to the commissions and outlined total revenues on accommodation and conferences.



45. Despite setting out the revenues, the Respondent did not provide any evidence before the Senior Principal Magistrate that the revenues were earned.
46. As the employer, the Appellant would have custody of the revenue records.
47. However, the Respondent did not utilise the provisions of the *Evidence Act* to demand that the Appellant produce the revenue records.
48. The Respondent did not prove this head of the claim to the required standard.
49. The Court also notes that the Senior Principal Magistrate allowed this head of the claim without addressing his mind to it at all in the judgment.
50. In fact, the Senior Principal Magistrate failed to identify or isolate the question of breach of contract in respect to the commission as an issue in the body of the judgment.
51. Allowing the head of the claim was, therefore, an error of both law and fact.

Leave

52. On account of leave, the Respondent sought Kshs 7,000/- for 2 months.
53. The Respondent's filed witness statement did not talk about any accrued leave.
54. But the leave records produced by the Appellant indicate that the Respondent had 4.5 leave days as of 7 January 2019.
55. The Court, therefore, finds a basis to sustain this head of award.
56. Before concluding, the Court notes that the delivery of this judgment was delayed because of an intervening application by the Appellant to file a Supplementary Record of Appeal. The request was allowed on 8 June 2023.

Conclusion and Orders

57. Flowing from the above, the Appeal succeeds:
 - i. To the extent that the Court vacates the award of commission of Kshs 2,258,380/-
 - ii. The award of maximum compensation is vacated.
 - iii. The awards of pay in lieu of notice and accrued leave are left undisturbed.
58. The Respondent is awarded:
 - i. Compensation Kshs 300,000/-
 - ii. Pay in lieu of notice Kshs 60,000/-
 - iii. Accrued leave Kshs 7,000/-Total Kshs 367,000/-
59. The awards to attract interest at court rates from 10 June 2022.
60. Each party to bear own costs of the Appeal as the Appellant caused delay in delivery of the judgment, while the Respondent to have costs before the Senior Principal Magistrates Court.



DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 21ST DAY OF JUNE 2023.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Appellant Omondi, Abande & Co. Advocates

For Respondent Okoyo Omondi & Co. Advocates

Court Assistant Chrispo Aura

