



REPUBLIC OF KENYA



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

H Young & Company (EA) Limited v Omukuba (Employment and Labour Relations Appeal E139 of 2022) [2023] KEELRC 1511 (KLR) (16 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1511 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E139 OF 2022**

B ONGAYA, J

JUNE 16, 2023

BETWEEN

H YOUNG & COMPANY (EA) LIMITED APPELLANT

AND

AMOS SHIKHUTSI OMUKUBA RESPONDENT

(Being an appeal from the judgment and decree of Hon. Principal Magistrate S. A. Opande delivered on 27.07.2022 in Milimani CMEL No. E1501 OF 2019)

JUDGMENT

1. The learned trial Principal Magistrate delivered the judgment in the suit before the trial Court in favour of the respondent and against the respondent for:
 - a. Notice pay Kshs 48, 336.00.
 - b. Unfair termination Kshs 580, 032.00.
 - c. Service pay Kshs 34, 858.00.
 - d. Total sum claimed Kshs 663, 226.00.
 - e. Costs of the suit plus interest at Court rates.
2. The appellant filed the memorandum of appeal dated August 9, 2022 through Okwach & Company Advocates. The appellant stated that the trial Court erred in law and fact and misdirected itself as follows:
 - a. By holding that the respondent was wrongfully dismissed.
 - b. In awarding the respondent compensation for unfair termination.



- c. In awarding the respondent 12 months' salary in compensation for unfair termination.
 - d. In awarding the respondent payment in lieu of notice and service pay.
3. This is a first appeal and the role of the Court is to reevaluate the evidence and arrive at conclusions one way or the other bearing in mind it did not by itself take the evidence. The decision of the trial Court ought not be disturbed unless shown it misdirected itself and thereby arrived at conclusions that were not just or correct.
4. The appellant prayed for orders:
 - a. The judgment of the trial Court delivered on July 27, 2022 be set aside.
 - b. The Court to find that the respondent was not wrongfully or unfairly terminated.
 - c. The respondent is not entitled to reliefs awarded.
 - d. The appellant is granted costs of the appeal and costs of the trial Court.
5. The appellant filed submissions on the appeal and also for the respondent were filed through Lemmy Regau & Company Advocates.
6. The respondent had filed the statement of claim on August 22, 2019. His case was as follows. He was employed by the appellant in July 2017 as an Excavator Operator at respondent's Funzi Road Industrial Area in Nairobi. He earned Kshs 48, 336.00 per month. The claimant worked until October 30, 2018 when per his case, he was wrongfully and unlawfully terminated without due process and payment of his final dues. He claimed notice pay Kshs 48, 336.00; Leave days Kshs 60, 420.00; unfair termination Kshs 580, 032.00; service payment Kshs 34, 858.00; and total claimed being Kshs 723, 446.00.
7. The respondent pleaded that sometimes in October 2018 the respondent's Security Officer Mr Njuguna alleged there was a missing steel pipe at the stock pile. The claimant continued to work and on October 30, 2018 he received a dismissal letter. The respondent's case was that the termination was abrupt, unprocedural and amounted to unfair termination. No show cause letter and hearing held.
8. The appellant filed a memorandum of response on November 4, 2019. The appellant admitted it employed the respondent in the position and pay rate as pleaded for the respondent. The appellant further pleaded that in October 2018 the claimant was performing his duties when the respondent realised the disappearance of one steel pipe at the stock pile. Further, investigations showed that the claimant was responsible for the missing pipe. He was terminated upon that misconduct. The termination was procedural. The suit was an afterthought and ought to be dismissed with costs.
9. The respondent testified that he was dismissed on account of being suspected of stealing the pipe in issue. He testified that he was a member of NSSF. It was on October 16, 2018 that he was told that the pipe was missing. On October 30, 2018 he received the termination letter. His testimony was that he did not know if indeed the pipe got lost or stolen. He also testified that in 2018 he had not gone on annual leave being 22 days. In re-examination he stated, 'I had 26 days a year for leave. I had only 20 days.'
10. The appellant's witness (DW1) was Dorcas Wachera Njuguna. She testified that she was the appellant's Human Resource Manager. Her testimony was that on October 16, 2018 the respondent was involved in an incident whereby a steel pipe went missing. The respondent was suspected to have stolen it. That it was carried through the fence by the excavator. The project manager investigated the matter his terminal dues had been computed but then the appellant received the demand letter from the



respondent's lawyers. DW1 testified that the excavator could not carry the pipe but it was discovered it was carried through the fence. The net terminal dues were zero. He was paid leave days accrued but had statutory deductions. Being removed by summary dismissal, there were no formal dues to be paid. DW1 relied upon leave statement of November 8, 2018 to say outstanding leave days were 10. DW1 stated she was not present when the pipe was stolen. The fence was damaged showing the excavator had carried the pipe. DW1 then testified in cross examination thus, 'I have no evidence of his explanation. It was never confirmed he stole the pipe. He was terminated because of stealing. The statement talks of suspicion. There was a procedure for summary dismissal. I do not know if the procedure was followed. He was entitled to 26 days of leave.'

11. The 1st issue is whether the trial Court erred in finding that the termination was unfair. The trial Court found that the respondent had not been given a chance to defend himself as there was no letter inviting him to a disciplinary hearing. Further, there were no minutes of disciplinary hearing. The Court finds that the analysis by the trial Court was consistent with the evidence that no letter to show cause had issued and no disciplinary hearing took place. Thus notice and hearing under section 41 of the *Employment Act* had not been complied with. In any event, DW1 testified that it was never confirmed the pipe had been stolen yet the respondent had been terminated on account of stealing the pipe. By that evidence DW1 as well confirmed that there was no genuine reason as at termination as per section 43 of the Act and it was not shown that the reason for termination was about the respondent's conduct, compatibility and the appellant's operational requirements per section 45 of the Act. The Court returns that the trial Court did not err in returning that termination was therefore unfair and unlawful both in procedure and merits.
12. The 2nd issue is whether the trial Court erred in awarding all the reliefs as had been prayed. The trial Court awarded all reliefs as prayed because the termination had been unfair except for leave days found taken per leave register. The Court returns as follows:
 - a. As the termination was abrupt without due notice and hearing, the respondent was entitled to notice payment Kshs 48, 336.00 and per section 35 of the Act.
 - b. While granting the maximum compensation, there was no mention of section 49 of the Act and the prescribed factors for consideration. The respondent had served for slightly over one year. He did not contribute to his termination. The appellant offered no mitigation by way of explanation of failure to comply with the prescribe due procedure. If the due procedure had been followed, it could be that per DW1's testimony, nothing would have been found as implicating the respondent. In that consideration the 12 months awarded in compensation would not be disturbed making Kshs. Kshs 580, 032.00.
 - c. As submitted for the appellant, the respondent was a member of NSSF and per section 35(5) read with 35(6) (d) of the Act, the service payment as prayed for is not available.
 - d. The trial Court addressed the issue of leave but which appears not to have been claimed at all and the issue will rest as irrelevant.
- 13 In conclusion the appeal is hereby determined with orders:
 - a. The trial Court's judgment and decree is varied to the extent that the sum of money awarded is Kshs 628, 368.00 (less PAYE) and as found in this judgment.
 - b. The award of costs plus interest by the trial court is upheld.
 - c. Considering partial success of the appeal, the respondent to pay the appellant partial costs of the appeal fixed at 20% to be agreed upon or taxed in the usual manner.



**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS
FRIDAY 16TH JUNE, 2023.**

BYRAM ONGAYA

PRINCIPAL JUDGE

