



**Makora v Simba Coach Ltd (Appeal 27 of 2019)  
[2023] KEELRC 1492 (KLR) (13 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1492 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 27 OF 2019  
AN MWAURE, J  
JUNE 13, 2023**

**BETWEEN**

**JACOB ONGERE MAKORA ..... APPELLANT**

**AND**

**SIMBA COACH LTD ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein filed an appeal against the judgment and decree of honourable E. Wanjala Senior Resident Magistrate delivered on the July 25, 2019 in the Chief Magistrates Court in Cause 387 of 2019. The memorandum of appeal is dated August 21, 2019. As per the judgment, the learned trial magistrate found that the appellant's termination was not redundancy but a case of unfair termination. The court proceeded and awarded 12 months' gross salary compensation.
2. The appellant being dissatisfied with the judgment of the court seeks the following remedies from court.
  - a. That the learned magistrate erred in fact and law by failing to make a finding that the manner of the appellant's termination was a redundancy.
  - b. The learned magistrate erred in law and fact by failing to award the appellant leave and house allowance in accordance with the provisions of section 28 and 31 of the *Employment Act, 2007* despite overwhelming evidence that these were payable.
  - c. The learned magistrate erred in law and fact in failing to award the appellant his claim for one month's salary in lieu of redundancy, severance pay and overtime.
  - d. The learned magistrate erred in law and fact by holding that the appellant had not proved his case in respect to leave, house allowance, severance pay, one month's severance notice, overtime,



and others despite the fact that the appellant's evidence in the witness statement and in court was not controverted.

3. The appellant seeks the following orders;
  - a. The Appeal be allowed.
  - b. The judgment and decree of the honourable Magistrate (E. Wanjala SRM) dated and delivered on 25/7/2019 be set aside.
  - c. The honourable court do enter judgment in respect of the prayers sought in the statement of claim in the lower court
  - d. Costs of the Appeal be allowed to the claimant

### **Brief facts of the Case**

4. The claimant in the memorandum of claim dated the March 22, 2019 says that he was employed as a distant driver by the respondent's bus Company which contract was never reduced in writing by the respondent as required by section 9 of the [Employment Act, 2007](#) nor was the claimant given an appointment letter. His monthly pay was ksh 25,000/= which was exclusive of house allowance. It is said that he used to work for 10 hours daily as opposed to the statutory maximum of 8 hours per day without any overtime payment of 2 hours contrary to the law. Further, that he was underpaid going by the provisions of the general wages Order.
5. He further says that he was unlawfully and unfairly terminated on the October 23, 2018 without being given notice or accorded an opportunity for fair hearing contrary to section 41 of the [Employment Act, 2007](#) and the principles of natural justice. The Appellant said that he was also denied his terminal dues.
6. The case proceeded to formal proof hearing with the Respondent not giving evidence in the case and not filing submissions. However the court considered the appellant's written submissions dated November 25, 2022.

### **Determination**

7. As the first appellate court, this court has a duty to consider the evidence adduced before the trial court and re-evaluate it so as to draw its independent conclusion and to satisfy itself that the conclusions reached by the trial magistrate are consistent with evidence See *Selle v Associated Motor Boat Company Ltd* 1968 eKLR .
8. The court has carefully considered the judgment of the trial court, the record of appeal, the submissions by counsel as well as the authorities cited and the law. The issues for determination can be summarized as follows;
  1. Whether the trial magistrate erred in law and fact by failing to find the termination was vide redundancy.
  2. Whether the learned Judge erred in failing to award one month salary in lieu of redundancy, severance pay, house allowance, leave and overtime.
9. Section 2 (i) of the [Employment Act](#) 2007 define redundancy as "The loss of employment, occupation, job or career by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office and loss of employment. The provision is at parity



with *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya and 3 others* Civil Appeal No 46 of 2013 where the Court of Appeal held that:

“Loss of employment by redundancy has to be at no fault of the employee and arises where services of an employee are superfluous through the practice commonly known as abolition of job or occupation and loss of employment”.

10. There was no evidence given by the claimant at the formal proof hearing that he was declared redundant and neither was it raised in his pleadings. The claimant in his own evidence informed the subordinate court that he was terminated/ sacked unlawfully. This is what also appears in the adopted witness statement dated the March 22, 2019. It follows therefore that the claim for redundancy was not proved and the severance pay did not lie, and the same was rightly not awarded at the trial court. The court does not find that the trial magistrate erred in declaring the claimant was unlawfully terminated. There is no evidence for a case of redundancy.
11. There was no contract of employment placed before the trial court to show the entitlement of the claimant to house allowance. Nor did the claimant demonstrate that he sought the house allowance during his term of employment from the year 2013 to 2018. The same is found to be unmerited.
12. The prayer for leave allowance was also not proved and once again the appellant did not prove he applied for leave during that period and was denied such leave. The prayer for leave is therefore not merited and is denied.
13. The prayer for one month for redundancy is not merited as the court has clearly established that the appellant was not terminated via redundancy. Hence he was awarded one month salary in lieu of notice and that does suffice. Prayer for notice for declaration of redundancy is not merited and so is not granted.
14. There is also no proof of overtime claim and this court agrees with the trial magistrate that the prayer for overtime is not proved and so is not granted. The appellant says the prayers have not been controverted by the respondent and so should be granted. It is true the respondent did not file a response and so did not controvert the evidence adduced but as well the court cannot grant that which is not proved that notwithstanding.
15. Under the circumstance the court therefore finds the appellant has not proved his appeal and so the said appeal is dismissed. In that case the appeal fails but considering the appellant worked for the respondent for about 5 years as a driver the court will substitute the award for general damages from 3 months to 5 months considering the guidelines in section 49(1)(c) of the *Employment Act* 2007. I will also order each party to meet their costs of this appeal but the costs of the lower court case will still be paid to the appellant based on the enhanced award of Kshs 150,000/-.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13<sup>TH</sup> DAY OF JUNE, 2023.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They



have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court had been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**ANNA NGIBUINI MWAURE**

**JUDGE**

