



**Hakika Transport Services Limited v Idle (Civil Appeal E003 of 2022)
[2023] KEELRC 2040 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2040 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CIVIL APPEAL E003 OF 2022**

**M MBARŪ, J
JULY 27, 2023**

BETWEEN

HAKIKA TRANSPORT SERVICES LIMITED APPELLANT

AND

HASSAN HAGAR IDLE RESPONDENT

(Being an appeal from the judgment of the Hon. M. L. Nabibya, Principal Magistrate delivered on 21 January 2022 in Mombasa CM ELRC No.822 of 2019)

JUDGMENT

1. The appeal herein is from the judgment of the Principal Magistrate in Mombasa CM ELRC No 822 of 2019 delivered on January 21, 2022 and where the learned trial magistrate held that the respondent's employment was unfairly terminated and the response that he had absconded and absented himself at work was unfair.
2. Aggrieved, the appellant filed this appeal on five (5) grounds and mainly on the grounds that the trial court failed to take into account the evidence submitted before it and that the respondent absconded work and hence in assessing excessive maximum compensation despite the finding that the contract was operative document and that the respondent was on probation for 6 month and hence attributed no reasons for the award.
3. Both parties attended court and agreed to address the appeal by way of written submissions.
4. The appellant submitted that the respondent was an employee on August 1, 2015 to December 16, 2016 and his last salary was Kshs 14,250 in terms of his contract of employment. at the beginning on September 2016 the respondent left his employment for no reasons until November 24, 2016 when he returned and was re-employed but on December 14, 2016 he left again and then filed suit. The learned magistrate erred in finding that the respondent was unfairly terminated and making an award of maximum compensation. In the findings of the court, there was a finding that the respondent had



- been on probation for 6 months but went ahead to make a maximum compensation as held in the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR.
5. The appellant submitted that the trial court did not consider the submissions filed and for these reasons arrived at an erroneous judgment which should be set aside and the appeal allowed.
 6. The respondent submitted that the appeal herein should be dismissed for want of compliance with order 42 rule 53(2) of the *Civil Procedure Rules* which requires the appellant to file a decree as part of the record of appeal which is lacking in this case. An appeal lodged at the court and is not prosecuted for over a year should be dismissed as held in *Protein & Fruits Processors Limited & another v Diamond Trust Bank Limited* [2015] eKLR.
 7. Contrary to order 42 rule 13(4)(f) there is no decree attached to the appeal and not clear which judgment is subject of the appeal. This is a mandatory requirement as held in *Paul Kurenyi Lesbuel v Ephantus Kariithi Mwangi & another* [2015] eKLR. The record of appeal is incomplete without pages 29/30 and whereas the appellant indicates that the judgment delivered had 4 pages, the record filed is different and the appeal is without merit and should be dismissed.
 8. An appeal to this court should abide the provisions of rule 8 of the *Employment and Labour Relations Court (Procedure) Rules, 2016*. Under rule 8(3) and (4), an appellant should;
 3. A memorandum of appeal shall be in form 1 set out in the first schedule with necessary modifications.
 4. A memorandum of appeal shall be accompanied by copies of the proceedings, all documentary evidence relied on and a copy of the judgment from the proceedings of the matter being appealed against. Provided that where copies of proceedings are not filed with the memorandum of appeal, the appellant shall file the such copies as soon as possible and within a reasonable time.
 9. Form I gives an appellant the records to be attached to the record of appeal. being an appeal, copies of proceedings from the trial court should form part of the record of appeal together with a copy of the judgment for the proceedings of the matter being appealed against and for completeness, the decree which issued from such judgment. These are common and practical aspects of any appeal.
 10. Where the rules of the court as not sufficient for any matter, parties are allowed to rely on the *Civil Procedure Act* and the rules thereto.
 11. In this case, the record of appeal is incomplete.
 12. The memorandum of appeal was filed on January 31, 2022. The record of appeal was filed on May 29, 2023.
 13. The respondent filed written submissions dated July 3, 2023 and raised these lapses but the appellant did not take heed.
 14. In analysing the appeal, the judgment of the trial court against which the appeal rests is incomplete. From the appellant's submissions, the court cannot discern the entirety of the appeal since the judgment is incomplete. The record of appeal has page 30 as the end of the judgment which is not in full.
 15. Conspicuously missing is the decree. It therefore becomes practically impossible to address the grounds of appeal especially ground No (4) that;



The trial magistrate erred in law and fact by assessing excessive maximum compensation despite finding that the contract as the operative document and that the respondent herein has served a probation period of 6 months and attributing no reasons for the award.

16. With the judgment incomplete and no decree attached to the record of appeal as required under rule 8 of the Court Rules, the appeal is rendered fatal.

17. Under order 42 rule 2 of the Civil Procedure Rules which provides that;

Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed.

the appellant moved with the appeal without taking the above into account.

18. A record of appeal is essentially supposed to be complete with all necessary documents as held in Law Society of Kenya v Centre for Human Rights and Democracy & others, Supreme Court petition No 14 of 2013 that;

If an intending appellant were to present the court with a notice and petition of appeal, but without the record of appeal, and expect the court to determine ‘the appeal’ on the basis of these two, such an appeal would be incomplete and hence incompetent. Indeed, this is the gist of rule 33(1) of the Supreme Court Rules

18. The record of appeal is therefore incomplete. In the words of the Supreme Court in civil application No 20 of 2014 Bwana Mohamed Bwana v Silvano Buko Bonaya & 2 others (2014) eKLR the court did not hesitate to make a finding that such an appeal would be incomplete and hence incompetent.

19. Having said so, there is no competent appeal for consideration. The appeal is therefore struck out with costs.

Orders accordingly.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.

In the presence of:

Court Assistant: Japhet Muthaine

M. MBARŪ

JUDGE

..... and

