



Bloomingdale Rose Kenya Ltd v Nderitu (Employment and Labour Relations Appeal E012 of 2022) [2023] KEELRC 1698 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1698 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E012 OF 2022**

ON MAKAU, J

JULY 14, 2023

BETWEEN

BLOOMINGDALE ROSE KENYA LTD APPELLANT

AND

CATHERINE WANGARE NDERITU RESPONDENT

(Being an Appeal against the Judgment and Decree of the Honorable Ben Mararo, Principal Magistrate in Nanyuki Chief Magistrates Court ELRC Cause No. 12 of 2020 delivered on 19th July, 2022)

JUDGMENT

Introduction

1. The respondent was employed by the appellant as a Packhouse Manager under 3 months seasonal contract from April 18, 2017. The said arrangement continued until April 1, 2019 when she was confirmed in the position of Assistant Packhouse Manager. Her salary jumped from Kshs 16,000 to Kshs 18,000 and then Kshs 20,000 per month. Soon thereafter, the respondent fell ill due to the “difficult and deplorable working conditions” and she was on and off duty. On October 12, 2019 her services were verbally terminated by appellant without prior notice, without valid reason and without being accorded a fair hearing.
2. Aggrieved by the termination, the respondent sued the appellant in the subordinate court alleging that her services were unlawfully, unfairly and maliciously terminated and that efforts to resolve the dispute at the labour office failed. Therefore she prayed for damages for the unlawful action by the employer.
3. The appellant denied liability and maintained that the termination was grounded on valid reason and the claimant was served with a Show Cause letter followed by a hearing which she declined. Finally it contended that it paid the respondent all her terminal dues and therefore the suit was unmerited.



4. After hearing evidence from both parties, the trial court (Hon. Mararo, PM) framed two issues for determination, that is;
 - (a) Whether the dismissal of the respondent was justified, and
 - (b) Whether she was entitled to the reliefs sought.

In the end he found that the respondent had proved, on balance of probability, that her dismissal was unfair and unlawful and awarded her 12 months salary as compensation for unfair termination, two months salary in lieu of notice, salary for October and November 2019, Kshs 100,000 general damages for wrongful termination of employment, costs and interest at court rate from the date of the judgment.

The Appeal

5. The appellant was aggrieved and brought this appeal seeking to dislodge the whole judgment on the following grounds;-
 - a. That the trial magistrate erred in law and fact in finding that the claimant's employment was unlawful, arbitrary and unfairly terminated by the Appellant whereas the evidence on record was to the contrary.
 - b. That the trial magistrate misconceived itself and erred in law and fact by holding that the respondent do pay Kshs 40,000 being salary for 2 months in lieu of notice contrary to the express provisions of the contract of service between the parties.
 - c. That the trial magistrate erred in law and fact by holding and awarding Kshs 40,000 to the claimant as salary for October and November 2019 contrary to the evidence on record.
 - d. That the trial magistrate erred in law and fact by awarding Kshs 240,000 as compensation for unfair and unlawful termination contrary to the evidence on record which confirms and proves that, the respondent herein sacked herself from the appellant's service.
 - e. That the trial magistrate erred in law and fact by awarding Kshs 100,000 as damages for unlawful termination, an award unknown to the *Employment Act, 2007* and the available jurisprudence in Kenya.
 - f. That the trial magistrate erred in law and fact by holding that the respondent herein proved her case to the required standard contrary to the evidence on record and appellant's submissions on record.
 - g. That the trial magistrate erred in law and fact by failing to find that the respondent actually terminated her services by failing to report to work when the appellant on humanitarian ground and advise from the conciliator decided to reinstate the respondent herein.

Appellant's Submission

6. It was submitted that the respondent was accorded a chance to defend herself before the dismissal but she declined. Reliance was placed on the case of *Antony Manyasa & 5 others v Brinks Security Services Ltd* [2018] eKLR.
7. The respondent further submitted that, when the matter went to the Labour Officer, the Conciliator found that the termination was lawfully done but on humanitarian grounds, the appellant offered to reinstate the respondent. The offer was rejected by the respondent by refusing to report back to work.



Therefore it was submitted that the trial court ignored the said evidence and irregularly ruled in favour of the respondent.

8. As regards the damages awarded, it was submitted that the respondent was not entitled and the trial court erred in awarding the same. First it was submitted that there was no proof that the termination was unfair to warrant compensation under Section 49 of the *Employment Act*. Further the discretion to award maximum compensation was not properly exercised and the award of general damages of Kshs 100,000 was also strange to our employment law.
9. The appellant further faulted the trial court for awarding two months salary in lieu of notice when the summary dismissal was done lawfully. Besides the contract of service only provided for a termination notice of 30 days. Finally, it was submitted that the respondent left work on October 12, 2019 of her own volition and never worked in November 2019. That she was paid for the days worked in October and therefore the award of full salary for October and November 2019 was an error as she was not entitled to the same.

Respondent's Submission

10. It was submitted that summary dismissal of the respondent was illegal, unlawful, unprocedural and without valid reasons as required under Section 41, 43 and 45 of the *Employment Act*. It was pointed out that the appellant conceded that there was no proof of service of the said Show Cause Letter. The respondent was also not accorded any hearing before the dismissal as required under Section 41 of the *Act*. Reliance was placed in the Court of Appeal decision in *Cooperative Bank of Kenya Ltd v Sammy Kimeli Yator* [2021] eKLR to urge the court to find the appeal to be without merits and dismiss it with costs.

Mandate of this Court

11. As the first appellate court, my duty is to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw my own independent conclusions, and ensure that the conclusions reached by the trial court are consistent with the evidence. (See *Sanitam (EA) Ltd v Rentokil* [2006] 2 KLR 70).
12. In this case, I have carefully considered the judgment of the trial court, the record of appeal, the submissions by counsel as well as the law and cited authorities. The issues for determination are:-
 - a. Whether the dismissal of the respondent was unfair and unlawful.
 - b. Whether the respondent was entitled to the damages awarded by the trial court.

Unfair Termination

13. The question of unfair termination of employment is no longer new in Kenya. The principles to consider are the reason for the termination and the procedure followed before the dismissal. Section 45(2) of the *Employment Act* provides that;
 - (2) A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee's conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and



c. That the employment was terminated in accordance with fair procedure.”

14. The reason cited for the dismissal of the respondent was gross misconduct in the name of refusal to obey a lawful command. The appellant produced as exhibit a summary dismissal letter dated October 12, 2019 which reads as follows;

“Re: Summary Dismissal

On September 28, 2019 and on October 4, 2019 you were issued with transfer letter instructing you to move from Packhouse Department to Production but you declined to accept the transfer. You also refused to sign the letter claiming that you didn’t want to work in the greenhouse and you wanted the company to terminate you, an act witnessed by three witnesses. ...

On October 4, 2019 you were issued with a show cause letter informing you to give explanation within 48 hours and state why the company couldn’t summarily dismiss you for refusing to obey the lawful command of which you never provided any explanation.

In view of the above, your action amounts to gross misconduct and punishable by summary dismissal according to the Employment Act 2007 Section 44(4)(e) that states

Accordingly, Bloomingdale Roses (K) Limited is left with no option than to summarily dismiss you on grounds of gross misconduct effective October 12, 2019 ...”

15. The respondent denied service of the transfer letter, show cause letter and the dismissal letter. She contended that the only time she saw the letters was at the Labour Office but she declined to sign. The trial court observed in its judgment that:

“It is in contention that the claimant was served with a notice to show cause; it is her case that she was verbally dismissed from service on October 12, 2019. That she only came across the letter relied upon by the respondent when she was asked to appear in Meru Labour County Office. It was at this instant that she states she was forced to sign the said documents but she refused. The *prima facie* evidence is that all the documents relied upon by the Respondent were never signed. This clearly corroborates her testimony that she was never served with said documents as alleged by the respondent.

In her evidence, the respondent stated that the claimant refused to accept the transfer letter issued to her by the Management alongside three witnesses namely Himmat Singh – Packhouse Manager, Moses Njogu – Packhouse Senior Supervisor, Mary Kathambi and Anjelica Karamuta – Welfare Representative. All these witnesses were never called to shed light on whether the claimant refused to accept the transfer letter as alleged. It is also worth noting that DW1 who testified was not amongst the witnesses who were present when the claimant was said to have allegedly refused to accept the transfer letter. This lends credence that her evidence was just hearsay. Nobody witnessed the incident. In law such evidence is inadmissible and of no any evidential value in a case.”

16. I have carefully perused the evidence on record. The validity of the reason for the dismissal depends on proof of the service of the transfer letter, and the show cause letter upon the respondent before her dismissal on October 12, 2019. My evaluation of the evidence on record leads me to the conclusion that the said letters were never served upon the claimant before the dismissal. She was only shown them at the Labour Office during conciliation after the dismissal.



17. As correctly observed by the trial court, the three witnesses named in the Show Cause letter were not called to give evidence before the trial court and therefore the evidence by DW1, who never witnessed the refusal to receive service is nothing more than hearsay.
18. As regards the procedure followed, the answer is fairly straight forward. First the alleged show cause letter was never served, and therefore the respondent was never given opportunity to defend herself in writing. Secondly, the respondent was not given an opportunity to defend herself as required by Section 41 of the *Employment Act*. The said provision states that:
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
19. In this case the evidence on record show that, what the appellant refers to as hearing was actually the conciliation process that happened after the dismissal. I say so because the defence witnesses spoke of reinstatement which was allegedly declined by the respondent. Considering the evidence on record, I am satisfied that the respondent never established before the trial court that a fair hearing was accorded to the respondent as prescribed by Section 41 of the *Employment Act*.
20. Having found that the appellant did not prove a valid reason for dismissing the respondent and that fair procedure was followed, I must hold that the summary dismissal of the respondent by the appellant was unfair and unlawful within the meaning of Section 45 of the *Employment Act*. To that extent I am satisfied that the conclusions reached by the trial court on this question was right and based on evidence.

Award of Damages

21. The respondent prayed for salary in lieu of notice, compensation for unfair termination, salary for October and November 2019, general damages and any other just relief. In view of the correct finding that her dismissal was unfair and unlawful, the trial court was right in finding that the respondent was entitled to salary in lieu of notice and compensation for unfair termination under Section 49(1) of the *Employment Act*.
22. However he fell into error when he awarded two months' salary in lieu of notice yet the respondent had admitted during cross-examination that her contract provided for a notice period of 30 days before termination. The said award was not based on evidence and it is therefore set aside and replaced with an award of one month salary in lieu of notice.
23. Likewise, the trial court fell into error by awarding the maximum compensation of 12 months salary as compensation for unfair termination without any justification. Section 49(4) (a-m) of the *Employment Act* outlines the factors to consider when determining the reliefs to award to an employee under Section



49 of the Act. The trial court never considered any of the said factors to justify his award of the maximum 12 months' salary compensation.

24. It is a well settled principle of law that an appellate court will not interfere with a discretionary award unless it is based on no evidence or no law or if made without taking into account a relevant factor or by taking into account irrelevant factor. At the risk of repeating myself, the award of 12 months' salary compensation was made without considering relevant factors as set out in Section 49(4) of the Act and therefore this court has the right to interfere with it.
25. Consequently, I set aside the award of 12 months' salary compensation and substitute it with an award of 10 months' salary for the reasons that the respondent served for relatively short period of about two and half years but did not contribute to her dismissal through misconduct. Finally, I have considered the admission by the appellant that the respondent fell ill due to cold working conditions at the packhouse. The said condition has made her weak and compromised her ability to continue working.
26. The respondent was also awarded Kshs 100,000 as general damages for wrongful termination of employment. As correctly submitted by the appellant, the said award is alien to our employment law. It was therefore an erroneous award and I must, as I hereby do, set it aside entirely. The only discretionary award for unfair termination is compensatory damages of upto a maximum of 12 months gross salary availed by Section 49 of the *Employment Act*
27. Finally, the respondent was awarded full salary for October and November 2019. The said award was not supported by evidence and the pleadings. The evidence on record and the statement of claim were clear that the respondent was dismissed from employment on October 12, 2019. There is also evidence that she was paid Kshs 11,311 on October 12, 2019. Consequently I find and hold that the respondent was not entitled to that award and it is set aside entirely.

Conclusion

28. In view of observations and findings made herein above, I find that the appeal succeeds partially to the extent highlighted above. The court has confirmed the declaration by the trial court that the summary dismissal of the respondent was unfair and unlawful. However the award of damages is set aside and substituted therewith the following awards in favour of the respondent:

- a. Notice Kshs 20,000.00
 - b. Compensation Kshs 200,000.00
- TotalKshs 220,000.00

The award is subject to statutory deductions.

Since the appeal has only succeeded partially, each party will bear own costs. The costs and interest awarded in the lower court remains as ordered by said court.

DATED, SIGNED AND DELIVERED AT NYERI THIS 14TH DAY OF JULY, 2023.

ONESMUS N MAKAU

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 1 April 5, 2020, this judgment has been delivered



to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

