



Gateway Marine Services Limited v Muia (Employment and Labour Relations Appeal E010 of 2023) [2023] KEELRC 1995 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1995 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
EMPLOYMENT AND LABOUR RELATIONS APPEAL E010 OF 2023**

M MBARŪ, J

JULY 13, 2023

BETWEEN

GATEWAY MARINE SERVICES LIMITED APPELLANT

AND

FELIX MASILA MUIA RESPONDENT

(Being an appeal from the judgment and decree of the Hon. Maureen Nabibya (SPM) delivered on 12 January 2023 in Mombasa CM ELRC No. 484 of 2021)

JUDGMENT

1. The appellant filed this appeal following judgment in Mombasa CM ELRC No 484 of 2021 delivered on January 12, 2023 which allowed the respondent's claim and an award of notice pay at Kshs 59,000, compensation for unfair termination of employment at Kshs 531,000 being 9 months gross salary with costs and interests on the awards.
2. Aggrieved, the appellant filed the appeal on 5 grounds. The grounds of appeal can be summarised to be that the learned magistrate erred in finding that there was unfair termination of employment whereas the contract of employment was attached to the response and the finding that there was no contract error. The appellant applied the termination clause as agreed by the parties and paid terminal dues accordingly and hence notice pay should not have been awarded as notice had issued before employment was terminated.
3. The claim before the trial court was that the respondent had been employed by the appellant as an accountant at a gross wage of Kshs 59,000 per month and at the onset of Covid pandemic and appellant used the respondent's personal line to received internet banking cash to make petty cash payments until June 2020 when the respondent acquired another line registered in his name for the same purpose. On August 17, 2020 he received an email from the appellant alleging that funds were being transferred to his personal lone instead of the line registered for the company transactions and he was required to give



an explanation. The appellant demanded Mpesa statements and despite an explanation, on September 4, 2020 the appellant directed him to hand over his duties immediately and in November 2020 another employee was introduced as assistant and started frustrating the respondent and on January 5, 2021 notice terminating employment without giving reasons and he therefore claimed unfair termination of employment, notice pay and house allowances.

4. In response, the respondent admitted that the claimant had been employed as an accountant at a wage of Kshs 51,894 per month. An assistant was employed to hold the financial controller but not to relieve the respondent in his duties as alleged and employment was terminated in terms of Section 35(1) of the *Employment Act, 2007* (the Act) which allow an employer to issue notice and which right was invoked. The employment contract also allowed termination of employment upon notice which was issued. The wage paid was inclusive of the house allowance and the claims made should be dismissed.
5. As outlined above, the learned magistrate rendered judgment and agreed there was unfair termination of employment and allowed the claims save for house allowance.
6. Parties agreed and addressed the appeal by way for written submissions.
7. The appellant submitted that the finding by the trial court that the employer failed to file the contract document was in error and this document was filed together with the response. There was no proof of unfair termination of employment since the appellant invoked the contract terms with regard to the right to terminate employment upon notice which is allowed under Section 35(1) of the Act as held in *Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR*. the contract of employment allowed termination of employment upon notice and this was binding as held in *Manuel Anidos v Kinangop Wind Parks Limited (In receivership) [2019] eKLR*. the appeal should be allowed the order to pay compensation set aside.
8. The respondent submitted that even if the learned magistrate was in error in finding that the contract of employment was not filed, termination of employment was not procedural and was unfair as held in *Abok James Odera t/a AJ Odera & Associates v John Patrick Machira t/ a Machira & Co Advocates [2013] eKLR*. A termination clause in a contract of employment should abide the provisions of Section 40, 41, 43, 45 and 47 of the Act as held in *Sammy Walter Birya v Shree Swaminarayan Academy [2016] eKLR*. The claimant was not invited to respondent to any misconduct or any matter of his performance to justify termination of employment without notice and this resulted in unfair termination of employment. The appeal lacks merit and should be dismissed with costs.

Determination

9. This being a first appeal, the court is required to evaluate the pleadings, the evidence and arrive at own findings but take into account that the learned magistrate had the opportunity to hear the parties in evidence.
10. On the appeal and the written submissions, the issues which emerge for determination are whether there was unfair termination of employment and whether the remedies granted were justified.
11. One of the major changes in employment and labour relations in Kenya, is the Act and the rights there from. Unlike the previous scenario that gave the employer a bundle of rights at the shop floor, the Act has now balanced the terrain of employment and labour relations and created a paradigm shift to the real of fairness.
12. Even where the parties have a written contract with terms and conditions of employment and which allow termination of employment upon notice, without the mutual consent of the employee, the



employer is bound under Section 43 of the Act. Section 35(1) of the Act cannot be read alone. Every employment contract is to be read together with the bundle of rights secured under the law, the Act.

13. The question the employer must pose before issuing the notice terminating employment is whether these are valid and fair reasons to terminate an employee. Section 43(2) of the Act defines reasons for termination to be matters the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate employment. This is aptly captured in the case of *Joseph Mwaniki Nganga v United Millers Limited [2022] eKLR* where the court cited the case of *British Leyland UK Ltd v Swift (1981) IRLR 91* Lord Denning described the test of reasonableness in the following words: -

'The correct test is; was it reasonable for the employers to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employers may not have dismissed him.'

14. In this case, the appellant asserts that the employment contract which was produced before the lower court allowed termination upon notice. Such is not sufficient looking at the Act in whole. A reason that is valid, fair and reasonable must exist to justify termination of employment. That is the import of Section 43 of the Act.
15. Indeed the appellant had filed the contract of employment together with the response. The finding of the learned magistrate that employment terminated unfairly and contrary to section 45 of the act which justified the award of compensation cannot be faulted. Notice issued to the respondent and that much taken into account, only compensation for unfair termination should have been awarded.
16. In employment and labour relations, costs and interests should rarely issue for the reasons that once the employee is paid his terminal dues, the purpose should not be to enrich but to address the unfairness of the process. The costs awarded by the trial court are in order but the interests are set aside.
17. Accordingly, the appeal partially succeeds; award of notice pay is hereby set aside and the award of compensation at 531,000 is hereby confirmed. Costs are due for the lower court and interests are set aside. For this appeal, each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF JULY, 2023.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

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