



**Sana Industries Company Limited v Lolmoodoni (Appeal 119 of 2022)
[2023] KEELRC 2076 (KLR) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2076 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 119 OF 2022
MN NDUMA, J
AUGUST 24, 2023**

BETWEEN

SANA INDUSTRIES COMPANY LIMITED APPELLANT

AND

KAIN LOLMODOONI RESPONDENT

(Being an Appeal of the Judgment and Decree of the Senior Principal Magistrate's Court at Ruiru by Honourable J.A. Agonda (Principal Magistrate) dated the 23rd day of June, 2022 in Employment and Labour Relations Cause No. E016 of 2021)

JUDGMENT

1. The consolidated appeal arises from the judgment of the Principal Magistrate, Ruiru Court, Mr. J.A. Agonda delivered on 23rd June, 2023. There was a series of four (4) matters namely; Ruiru SPMEELRC Nos E15/2021; E16/2021; E17/2021 and E18/2021.
2. The parties consented to having Ruiru SPMEELRC No. E17/2021 (not before this Court) as the Test suit on the question of whether the termination of the claimants' employment was fair or not and the determination from the said test suit to apply to all other matters being Ruiru SPMEELRC Nos E15/2021; E16/2021 and E18/2021.
3. The Test suit in which the question of liability, that is, whether the termination of employment of the claimants was unlawful and unfair was not appealed against since the Appellant proceeded to settle the decretal amount in the test suit being E17/2021 and there is no dispute on that cause therefore.
4. The consent was therefore never varied, appealed against or set aside.

The question therefore arises as to whether the determination on the question of liability which was not appeal against is binding on the consolidated appeals in E19/2022; E20/2022 and E21 of 2022.



5. The learned trial magistrate in the consolidated appeals found that the dismissal of the claimants was unfair and unlawful and proceeded to award the claimants maximum compensation being the equivalent of 12 months' salary in compensation for the unlawful and unfair termination of employment. Pursuant to that finding, the trial Court also awarded the claimants; one month salary in lieu of notice.
6. The trial magistrate also awarded the claimant's terminal benefits including:-
 - i. Payment in lieu of annual leave not taken.
 - ii. Payment in lieu of 16 days salary not taken.
 - iii. Refund of Kshs.10,800 in respect of union dues deducted and not remitted.
 - iv. Costs and interest of the suit.
7. The appellant appeals the decision of the trial magistrate on the issue of liability and the awards made in favour of the claimant stating that the trial Court misdirected itself, applied the wrong principles and failed to consider the weight of the evidence adduced in finding that the termination of the employment of the claimants was unlawful and unfair and so the award in lieu of notice and compensation was not warranted.
8. That the trial magistrate erred in awarding maximum compensation of 12 months' salary to the claimants respectively and that the terminal benefits awarded in respect of annual leave not taken; 16 days salary, refund of union dues was done in error and against the weight of evidence adduced.
9. The first issue for determination is whether there is a proper appeal before this Court on the issue of liability, the Appellant having not filed any appeal against the judgment of the Court in the Test suit being SPMEELRC No. E17 of 2021.
10. By fact of there being no appeal filed in respect of the Test suit, the proceedings of the subordinate Court before this Court do not bear any testimony or oral evidence adduced in E120 of 2022 and E121 of 2022 the subject of the consolidated appeal.
11. It has been submitted by the respondent that the lack of Court proceedings has deprived the Court the benefit of examining crucial oral evidence and admission made by witnesses during trial of the Test suit before the subordinate Court.
12. That the Court is therefore not in a position to justly determine the issues raised by the appellant in the consolidated appeal and the Court ought to dismiss the appeal on this ground alone.
13. That in the case of *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR, it was held that in the first appeal, the Court has the responsibility to re-evaluate, re-analyse and re-consider the evidence adduced before the trial Court and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.
14. That this case was largely determined on the basis of oral evidence and admission made by witnesses during trial on 21st March, 2022. That the record of appeal before Court does not bear the said oral evidence and admissions, made by witnesses and so the Court does not have the chance to re-evaluate, re-analyse and re-consider all the evidence placed before the trial Court in totality to make a fair and just decision on the issue of liability and the awards made by the trial Court and now challenged in the appeal.



15. That on 8th February, 2022, the parties consented to having Ruiru SPMELRC No. E17/2021 (not before Court) as the Test Suit on the question of whether the termination of the claimant's employment was fair or not and the determination from the said test suit to apply to all the other matters being Ruiru SPMELRC Nos. E15/2021; E16/2021 and E18/2021. That so long as the consent remains in place and has not been set aside, and no appeal has been made against the determination of the trial Court in E17/2022, there is no valid appeal before this Court and the present consolidated appeal be dismissed with costs.
16. The respondent in this objection relies on the case of *Fredrick Otieno -vs- Pamela Awino* [2013] eKLR in which the Court explained the gist of consolidation of suits and selecting a Test suit. The Court observed that in consolidated suits, all cases with common questions of law or facts are disposed of together at the same time and determination thereon bind all other suits. Whereas in a test suit, all other steps in each of the matters with similar issues are stayed until the Test suit is determined or shall have failed to be a real trial of issues.
17. That there being no appeal against the Test suit, there cannot be any appeal before the Court on the issue of liability and the Court has no ability or capacity to determine whether or not the termination of the claimants was fair or not but must uphold the determination of the trial Court by dismissing the consolidated appeal.
18. The Court has carefully considered the record of appeal filed in consolidated appeal being E19/2022, E20/022 and E21/2022 and is satisfied that the appellant did not file before Court the certified proceedings before the trial Court in the Test suit being ELRC E17/2021. The proceedings of the trial Court show that the trial Court in the matters the subject of appeal relied on the proceedings of three (3) witnesses in the Test suit being ELRC E17/2021 which proceedings are not part of the appeal record.

Submissions by Appellant

19. In the submissions by the appellant, the appellant concedes that E017 of 2021, which was the Test suit is not before this Court. The appellant reiterates the grounds of appeal and urges the Court to find that the trial magistrate erred in finding that the dismissal of the respondents was unlawful and unfair. The appellant also seeks the Court to fault the awards by the trial magistrate.
20. The appellant states that the respondents were employed by the appellant as Security guards and that on 28/11/2020 and 29/11/2020, they were guarding the appellant's premises where an excavator was parked. That on 30/11/2020, the excavator's door was found open with its tool box tampered with and several items missing therefrom.
21. The Court notes that this narrative by the appellant which they state is common cause is not contained in the record of appeal by fact of the appellant having not filed the record of proceedings in the Test suit E017 /2021 which fact, the appellant readily accepts.
22. The responsibility to ensure the proper record was before the Court to enable the Court to consider and re-evaluate the evidence relied upon by the trial magistrate to arrive at the considered judgment in the consolidated appeals before Court solely rests with the appellant.
23. The record not having been filed, the Court agrees with the objection by the respondent that the appeal lacks merit since there is no basis of faulting the judgment of the trial Court.
24. The Court has in the circumstances considered the judgment of the Court in the consolidated appeal and the submissions by the parties and the case law submitted by the respondent including the case of



25. The trial Court stated in the judgment as follows:-
- “..... the ground for dismissal as advanced by the respondent was misconduct and such the respondent was required to explain to the claimant the reasons for the termination. There was no official communication regarding the said theft though. R.w.1 stated that the incident was reported at the police station but did not produce any Occurrence Book (OB). Further, she stated that the claimant was given an opportunity to be heard in a meeting held by R.w.1 and representative from the union but there was no minutes to proof who was in attendance and what was the outcome of the meeting.”
26. In the absence of the trial record, there cannot be any basis to fault the finding by the trial Magistrate that the dismissal of the respondents was not for a valid reason as required under Section 43(1) and (2) of the *Employment Act*, 2007 and that the appellant did not adhere to the provisions of Section 41 of the *Act* by granting the respondents a fair hearing before dismissing them without notice.
27. Accordingly, the Court finds that this appeal lacks merit and confirms the finding by the trial Court that the dismissal of the respondents herein was unlawful and unfair.
28. The trial Court went ahead to find that the terminal benefits claimed by the respondents including one month salary in lieu of notice; unpaid salary for 16 days; refund of union dues and payment in lieu of leave had been adequately proved by the respondents.
29. The appellant has placed nothing before Court to show that the conclusion by the trial magistrate was not based on the evidence placed before him and/or that he misdirected himself on matters of law relating to the facts before him. Accordingly, the appeal with regard to the terminal awards made by the trial magistrate also lack merit and is dismissed.
30. With regard to the award of maximum compensation to the respondents being the equivalent of 12 months' salary, again this finding was arrived at by the trial magistrate upon considering the facts placed before him during the hearing of the Test case. The trial magistrate considered the similar circumstances under which the respondents were summarily dismissed without notice, payment of any terminal benefits and without being granted a certificate of service. The trial magistrate found that the claimants had been wrongfully accused of participating and or facilitating theft of equipment to their loss and detriment.
31. There is again nothing before this Court to fault the reasoning of the trial magistrate in making the awards he made in the circumstances of this case. Accordingly, the Court upholds the award of compensation made to the respondents by the trial Court and dismisses the appeal in this respect also.
32. In the final analysis, the Court dismisses the consolidated appeal in its entirety and upholds the judgment of the trial Court without any variation at all, with costs before the trial Court and this Court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 24TH DAY OF AUGUST, 2023.

MATHEWS N. NDUMA

JUDGE

Appearance

Muli & Co. Advocates for the Appellant



Shisanya & Company Advocates for the respondent

Ekale: Court Assistant

