



REPUBLIC OF KENYA



KENYA LAW
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**Scrub and Surf Cleaning Services v Alivitsa (Appeal 31 of 2019)
[2023] KEELRC 2043 (KLR) (24 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2043 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 31 OF 2019
MN NDUMA, J
AUGUST 24, 2023**

BETWEEN

SCRUB AND SURF CLEANING SERVICES APPELLANT

AND

CAROLINE ALIVITSA RESPONDENT

(Being an Appeal from the judgment and the Decree of the Chief Magistrate's Court at Milimani Commercial Court, Nairobi delivered on the 6th August, 2019 by the Honourable Senior Principal Magistrate A.M. Obura (Mrs))

JUDGMENT

1. The appeal is filed against the decision of the Hon Senior Principal Magistrate delivered on 6/8/2019 at the Chief Magistrate's Court Nairobi in CMEL No 557 of 2018.
2. The grounds of appeal as set out in the Memorandum of Appeal dated August 21, 2019 may be summarized as follows:-
 - (a) The trial Court failed to appreciate the issues for determination and as a result failed to weigh and evaluate the evidence placed before it.
 - (b) The trial Court erred in finding that the termination of employment of the respondent was unfair against the weight of evidence adduced.
 - (c) The trial Court erred in awarding maximum compensation whereas the respondent had been employed for a period of one (1) year only.
 - (d) The Court erred in awarding house allowance despite that the respondent was paid agreed consolidated salary.



- (e) The Court also erred in awarding payment in lieu of notice despite that the respondent had absconded work and
- (d) The trial Court erred in awarding costs in favour of the respondent.
3. This being a first appeal, the Court is guided by the Court of Appeal decision in *Selle vs Associated Motor Boat Company Limited* [1968] EA 123 where Sir Clement De Lestang stated as follows:-
- “This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.
- However, this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances on probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally,”
4. The facts of the case before the Court aquo is that the Appellant employed the respondent as a cleaner at a monthly salary of Kshs 15,000 from August, 2017. That the respondent served the appellant continuously until October, 2018 when the appellant terminated the services of the respondent and failed to pay the respondent terminal benefits including one month salary *in lieu of* notice and Housing allowance calculated at 15% of the basic monthly salary. The respondent further claimed grant of a Certificate of Service and compensation for unlawful and unfair termination of employment in terms of Section 49(1) (c) and (4) of the *Employment Act*, 2007.
5. The learned trial magistrate in her judgment delivered on 5/8/2019 upon considering the testimony of the respondent (CW 1) and that of one Caroline Karimi (RW 1) who testified on behalf of the appellant arrived at the conclusion that there was no evidence to demonstrate that the respondent absconded duty as was alleged by RW 1. The trial Court further found that the appellant dismissed the respondent from employment without following the procedure provided under Section 41 of the *Employment Act*, 2007. The Court further found that the appellant had no valid reason (s) to dismiss the respondent from employment and therefore the dismissal of the respondent from employment was unfair.
6. The trial Court proceeded to provide the remedies set out in the statement of claim including:-
- (a) Kshs 15,000 *in lieu of* one-month notice.
- (b) Housing allowance of Kshs 29,250 for the period served and
- (c) Maximum compensation of the equivalent of twelve (12) months salary for the unfair dismissal in the sum of Kshs 224,250.
7. The Court has considered the evidence adduced by the respondent by firstly adopting her witness statement filed on November 27, 2018 in which she indicated she was employed by the appellant as a cleaner on or about August, 2017 at a salary of Kshs 15,000 and was not issued with a letter of appointment. That she served the appellant with loyalty until the October 9, 2018 when one Caro, the wife to her employer told her that there was no more work and she should leave. That she had just returned from annual leave on that day. That the dismissal was verbal. That the respondent was unable to meet her employer personally at the time. The respondent said she sought compensation for the dismissal.



8. Under cross-examination by counsel for the appellant the respondent stated that she had served the respondent for a period of 14 months and had been granted annual leave in the month of September, 2018. The respondent denied having seen a letter produced before Court dated August 30, 2018 through which the appellant had purportedly deployed her to work at Likoni, Apartments in Mombasa. The respondent stated that she was granted 21 days leave from August 21, 2018 and was to resume work on September 29, 2018 which she did. The respondent stated that she had not applied for the leave but it was granted to her by the appellant. That she was paid salary while on leave.
9. RW 1, Caroline Karimi testified that she was a Director of the appellant, which was a cleaning company. That the company used to clean offices and residential premises through its employees. That the respondent was their employee. That the claimant was on leave and resumed work on September 28, 2019 at the Norwegian Refugee Council. RW 1 testified that the respondent was not supposed to resume work at the guest house but was supposed to go to the respondent's office for re-deployment. That the appellant had given the respondent details of where to report but she did not come back to the office of the appellant at the end of her leave. RW 1 stated that the only thing she saw, later was a letter of demand. RW 1 testified that the appellant did not dismiss the respondent from work.
10. Under cross-examination RW 1 denied having met the respondent upon her return from leave. RW 1 said that she sent a text message to the respondent. RW 1 admitted that the respondent came to the office once, upon returning from leave. RW 1 stated that the respondent had sustained injuries at work and was initially away for 3 months and when she resumed work she was given one month off.
11. Upon a careful consideration of the evidence adduced by the parties and the submissions filed before Court, the Court is satisfied that the respondent was an employee of the appellant for a period of about 14 months as a cleaner earning a monthly salary of Kshs 15,000 per month. The Court is also satisfied that the respondent was on August 29, 2018 verbally sent away from work by RW 1, a director of the appellant without a valid reason and without following a fair procedure. The respondent was employed verbally and dismissed from employment verbally. It is was proved that the respondent was on leave during the month she was dismissed from work and was sent away upon resuming her duties by RW 1.
12. The Court just like the trial Court is satisfied that the respondent did not abscond work but was dismissed unlawfully and unfairly by RW 1 from work without notice, or payment in lieu of notice. The Court is satisfied that the appellant did not discharge its onus under Section 43(1) and (2) of the [Employment Act](#), by proving that it had a valid reason to summarily dismiss the respondent from her employment. The respondent demonstrated as was obliged under Section 47(5) of the [Employment Act](#), that the summary dismissal was wrongful as it was not for a valid reason, was without notice, and the appellant did not follow a fair procedure in dismissing her from work. The respondent was also not granted a Certificate of Service.
13. Accordingly, this Court does not fault the finding of the trial Court that the summary dismissal of the respondent from her work was unlawful and unfair.

Remedies

Notice

14. The Respondent was summarily dismissed without notice. The Court aquo was right in awarding her one month salary in lieu of notice in terms of Section 36 of the [Employment Act](#), 2007.



House Allowance

15. The respondent was verbally employed without a written contract. In the period she served the appellant she did not raise any grievance about the monthly salary she received. Clearly, the respondent was paid a consolidated salary of Kshs 15,000 per month. There is no evidence before Court that the respondent was underpaid by the appellant as a cleaner. Accordingly, the claim for payment of house allowance was not proved at all before the trial Court and the Learned Magistrate erred in awarding the amount sought by the respondent as unpaid house allowance. This award is set aside accordingly for lack of any prove.

Compensation

16. In the judgment of the trial Court, the trial magistrate did not give any reasons as guided under Section 49(1) (c) read with (4) why she arrived at a compensation of the equivalent of 12 months' salary in compensation. The evidence before Court is that the respondent had served the appellant for a period of 14 months. The respondent was paid salary for all days worked. The respondent suffered loss and damage for the sudden loss of her employment without notice or any valid reason. The respondent lost her support and that of her child. The respondent did not contribute to the summary dismissal from the evidence accepted by the trial Court. The trial Court failed in not providing any explanation for the award granted.
17. Considering the previous awards of this Court, including the; *Richard Ndirangu Gikonyo vs Prime Fuel S(K) Limited* Cause No 61 of 2014 and Cause No 261 of 2017 *Miss Sheila Kasiti Matsyi vs Miss Mwikali Solo*, the Court sets aside the award of the equivalent of 12 months salary in compensation and substitutes the award to be the equivalent of four (4) months' salary in compensation in the sum of Kshs 60,000.
19. The trial Court also erred in not directing the appellant to grant the respondent a Certificate of Service.
20. Accordingly, the Court sets aside the award of the trial Court and substitutes the same with the following final order in favour of the respondent as against the appellant: -
- (a) The respondent to receive from the appellant Kshs 15,000 *in lieu* of one-month notice.
 - (b) The appellant to pay to the respondent Kshs 60,000 in compensation for the unlawful and unfair dismissal.
 - (c) The appellant to provide the respondent with a Certificate of Service within 30 days of this judgment.
 - (d) The total amount of Kshs 75,000 to be paid to the respondent with interest at Court rates from date of judgment at the trial Court till payment in full.
 - (e) The appellant to pay the 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

Mr. Mungai for Appellant

Mr. Lumallas for Respondent



Ekale: Court Assistant

