



**Cook 'N' Lite Limited v Karani (Appeal E004 of 2022)
[2023] KEELRC 2387 (KLR) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2387 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E004 OF 2022
AK NZEI, J
SEPTEMBER 29, 2023**

BETWEEN

COOK 'N' LITE LIMITED APPELLANT

AND

PATRICK MWANYUMBA KARANI RESPONDENT

*(Being an appeal against the judgment of court dated 12th January 2022
delivered by Hon. A.S. Lesootia -PM in Mombasa CMELRC No. 325 of 2019)*

JUDGMENT

1. The appellant was the respondent in Mombasa CM ELR Case No. 235 of 2019 whereby the respondent had sued the appellant vide a memorandum of claim dated 10/4/2019 and filed in the aforesaid court on 12/4/2022. The respondent had pleaded that he was employed by the appellant as a Machine Operator on 1/2/1985 terminated in 1998, and reinstated in 1999, and then worked until 27/2/2019 when his services were terminated. That he was earning daily wages of ksh. 785 paid weekly, translating to ksh. 20,410 per month as he worked for 6 days per week.
2. The respondent had further pleaded that on 27/2/2019, he reported to work as usual but was told that there was no work for him, that he should go and wait for the management to call him, but no call came. That on going back to the appellant company, he was handed a termination letter which did not state any ground for termination. That the Respondent was terminated without notice, and that the termination was unfair and contravened section 35 and 43 of the *Employment Act*.
3. It was the Respondent's further pleading that he did not take leave during the period of his employment, and that this contravened section 28 of the *Employment Act*. The Respondent had further pleaded that at the time of his reinstatement in 1999, he was registered a member of NSSF but his deductions were never remitted for a period of 12 years and 5 months, contrary to section 21 of the *Employment Act* 2007.



4. The Respondent sought the following reliefs against the Appellant:-
 - a. a declaration that the Respondent's termination was unfair.
 - b. one month salary in lieu of notice (785X26).....ksh. 20,410
 - c. Leave pay for the period between January 1999 and February 27, 2019(21/30X20,460x20)ksh. 285,740.
 - d. unremitted NSSF deductions for the period January 1999 to May 2011 (149 months x 400)ksh. 59,600
 - e. 12 months compensation for unlawful termination (20,140x12 months)ksh. 244,900

Total ksh. 610,670

 - f. certificate of service.
 - g. costs of the claim and interest at Court rates.
5. Other documents filed by the respondent included an affidavit in verification of the claim, the respondent's written witness statement dated 10/4/2019 and an evenly dated list of documents. The listed documents included an NSSF statement dated 7/3/2019, a termination letter dated 6/3/2019 and a demand letter by the Respondent's Advocates.
6. The appellant defended the suit vide a Memorandum of Reply dated 7/5/2019, whereby the Appellant denied the Respondent's claim and further pleaded that the Appellant had agreed with the respondent, who had been engaged on casual basis, that the respondent would be paid on daily or weekly basis for the time he worked, and not on monthly basis; that the nature of the respondent's engagement was intermittent and he would only work when there was production going on in the appellant company; and that the respondent was not terminated by the appellant but left on his own volition and without giving notice. The appellant sought to have the respondent's claim dismissed with costs.
7. The respondent filed response to the appellant's reply on 2/7/2019 and joined issues with the Appellant.
8. Other documents filed by the appellant were a written witness statement of Shadrack N. Taura dated 19/7/2019 and an evenly dated list of documents. Documents listed on the said list included a monthly Attendance Sheet and the appellant's Certificate of Incorporation dated 10/12/1998.
9. Trial is shown to have opened on 19/8/2010 when the respondent testified and adopted his written witness statement as his testimony. The respondent further testified that the appellant changed its name to Cook "N" Lite Ltd in the year 1999 and employed him in the same year, whereupon he worked from 1999 to February 2019, and was not paid his dues. It was the respondent's further testimony that he was continuously employed until 27/2/2019 when he was told to go home for one week. That when he resumed duty; he was terminated.
10. Cross-examined, the respondent further testified that he worked continuously, every day save on Sundays, and worked for 8 hours a day from 1999 to February 2019. That his employment was terminated by the Appellant.
11. According to the trial court's record, hearing of the appellant's case proceeded on 18/2/2021. The appellant called one witness (Shadrack Tula Taura, RW-1), who adopted his written witness statement as his testimony. The witness further testified that the Respondent was employed by the appellant as



a casual in the Human Labour Department. The witness further testified that the Respondent went to RW-1's office and asked to be allowed to leave the Respondent company. That the appellant which had been in operation since 1999, did not issue the respondent with a termination letter. That the appellant asked employees to stay at home when production was low.

12. Cross-examined, the appellant's witness (RW-1) testified that the respondent's letter of termination of employment dated 6/3/2019 titled "termination of employment" did not give reason for the termination. That the witness (RW-1) did not have a clocking sheet or register incourt.
13. The trialcourt after taking written submissions from counsel for both parties, delivered its judgment in favour of the Respondent on 12/1/2022 as follows:-
 - a. Certificate of service.
 - b. One month salary in lieu of notice.....ksh. 20,410.
 - c. Accrued leave days.....ksh. 285,740
 - d. Unremitted NSSF contributionsksh. 59,600
 - e. Compensation for unfair termination.....ksh. 204,100
Total ksh. 569,850
 - f. Costs of the suit and interest.
14. Aggrieved by the said judgment, the appellant preferred an appeal to this court and set forth the following grounds of appeal:-
 - a. that the learned trial magistrate erred in law and in fact in applying wrong principles while awarding one month salary in lieu of notice in the sum of ksh. 20,410.
 - b. that the learned trial magistrate erred in law and fact in applying wrong principles while awarding accrued leave days in the sum of ksh. 285,740.
 - c. the learned trial magistrate erred in law and in fact in applying wrong principles while awarding unremitted NSSF contributions in the sum of ksh. 59,600.
 - d. that the learned trial Magistrate erred in law and in fact in otherwise failing to consider the Appellant's submissions placed before the Court.
15. This is a first appeal, and as stated in the case of *Mursal v Manesa* [2021] eKLR:-

“A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”
16. It is to be noted that the aforestated power and jurisdiction of a first appellate court is to be exercised based and guided by the grounds of appeal set out by the appellant. The principle that parties are bound by their pleadings is not diminished on appeal. Pleadings in an appeal are the memorandum of appeal, and where across-appeal has been filed the cross-appeal. The court cannot, in my view, determine matters that have not been raised on appeal, unless such matters are glaring matters of law, like the court's jurisdiction, limitation of action etc, or errors by the trial court that are apparent on the face of the record, which the appellate court cannot ignore.



17. The trialcourt framed the issues for determination as follows:-
 - a. whether termination of the respondent's employment was unfair.
 - b. whether therespondent was entitled to the reliefs sought.
18. The trial court made a finding that termination of the respondent's employment was unfair, and proceeded to grant the reliefs sought in the memorandum of claim. The appellant did not appeal against those findings. All that the appellant has challenged are the principles applied by the trial court in making the awards of ksh. 20,410 as pay in lieu of notice, accrued leave days in the sum of ksh. 285,740 and ksh. 59,600. I will proceed to determine the issue of whether, indeed, the trial Court applied the wrong principles in making the aforesaid awards.
19. On the award of one month salary [ksh. 20,410] in lieu of notice, the Respondent pleaded and testified that his employment was terminated without notice. This evidence was not rebutted by the Respondent, which did not dispute the authenticity of the termination letter dated 6/3/2019 and issued by the appellant. Under section 35(c) of the Employment Act, the respondent was entitled to one month notice before termination or payment of one month salary in lieu of notice. I uphold the trial court's finding in making the award of ksh. 20,410.
20. On the award of ksh. 285,740 being payment on accrued leave days, it was a common ground that the respondent was employed by the appellant from the year 1999 upto 27/2/2019 when he was told by the appellant to go home, and was subsequently handed a termination letter on 6/3/2019. The respondent testified that he worked continuously, save on Sundays, and worked for 8 hours per day without taking leave. The appellant did not rebut this evidence. All that the appellant told the court was that the respondent worked as a casual during the entire period of employment.
21. It is to be noted that even if the respondent had initially joined the appellant company as a casual, his employment was, in view of the long period served, deemed to be one where wages are paid monthly, withsection 35(1) (c) of the Employment Act applying. Section 37(1) of the Employment Act 2007 provides as much. It was not in dispute that the respondent worked for the appellant company from 1999 to February 2019, for a period of 20 years.
22. Under Section 28(1) of the Employment Act 2008, the respondent was entitled to at least 21 leave days in every year served. The Appellant did not demonstrate that the Respondent ever took leave during the 20 years of service. Section 74(f) of the Employment Act 2007 provides that an employer shall keep written records of all employees employed by him containing particulars of an employee's annual leave entitlement, days taken and days due specified in section 28. The appellant never produced such documents in rebuttal of the respondent's claim.
23. The trialcourt found that the respondent was entitled to 21 days leave for each of the 20 years worked, and awarded him ksh. 285,740 (20410 divide by 30X21x20). I find no fault in this award and calculation, and I uphold the same.
24. I, however, find fault in the award of ksh. 59,600 being unremitted NSSF contributions. I have stated time and again, and I repeat it here, that once statutory deductions are deducted from an employee's salary, such deductions cease to be the employee's entitlement/property. The deductions become an entitlement/property of the statutory body regarding which the deductions are made. Such statutory bodies, including NSSF, have elaborate statutory mechanisms, enacted in the parent Acts of Parliament, on recovery of deductions from employers who may, for whatever reason, make statutory deductions and then fail to remit them as by law provided. An employee cannot, therefore, seek to be refunded that which does not belong to him.



25. I find and hold that the award of ksh. 59,600 being unremitted NSSF contributions was not justified, and that the trial court fell into error in awarding the same. The award is hereby set aside.
26. I have noted that at paragraph 21 of the trial court’s judgment, the court stated as follows:-

“As regards the respondent’s counter-claim, the respondent did not lead evidence and establish its claim, the prayers sought were not pursued beyond pleadings. As such the counter-claim is dismissed.”
27. The foregoing finding, though not taken up by the appellant on appeal, was made by the trial court in error, and is a glaring error which this court cannot ignore. This is because the appellant herein, who was the respondent in the lower suit/primary suit, did not raise a counter-claim. I have looked at the appellant’s Memorandum of Reply dated 7/5/2019 and I have noted that it does not contain a counter-claim.
28. The trial court’s order dismissing a non-existent counter-claim was made in error, and is hereby set aside.
29. The appellant has not appealed against the trial court’s award of ksh. 204,100 being compensation for unfair termination of employment, the order for issuance of a certificate of service and the award of costs and interest, and the same will not be disturbed by this court.
30. Consequently, and in view of this court’s findings herein, and having considered written submissions filed by Counsel for both parties herein, the trial court’s judgment delivered on 12/1/2022 is hereby set aside, and is substituted with judgment for the respondent against the appellant as follows:-
 - a. one month salary in lieu of noticeksh. 20,410
 - b. accrued leave days.....ksh. 285,740
 - c. the equivalent of 12 months’ salary being compensation for unfair termination of employmentksh. 204,100

Total ksh. 510,250
31. The appellant will issue the respondent with a certificate of service pursuant to section 51 of the *Employment Act* within thirty days of this judgment.
32. Each party will bear its own costs of the appeal but the respondent is awarded costs of the proceedings in the court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH SEPTEMBER 2023.

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Respondent fees.

AGNES KITIKU NZEI

JUDGE



Appearance:

..... for Appellant

..... for Respondent

