



**Motrex Limited v Wanyonyi (Appeal E052 of 2022)
[2023] KEELRC 2473 (KLR) (9 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2473 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E052 OF 2022
M MBARŪ, J
OCTOBER 9, 2023**

BETWEEN

MOTREX LIMITED APPELLANT

AND

JOHN WANJALA WANYONYI RESPONDENT

*(Being an appeal from the judgment of Hon. Lesootia Saitabau
delivered on 16 June 2020 at Mombasa CM ELRC No. 265 of 2019)*

JUDGMENT

1. The background to this appeal is a claim filed by the respondent herein in Mombasa CM ELRC No.265 of 2019 on the grounds that he was employed by the appellant on 9 January 2013 as heavy commercial driver at a wage of Kshs. 33,546 per month and worked until 7 February 2019. That from 1st to 7 February 2019 the appellant entrusted the respondent with its motor vehicle Kxxx loaded with goods heading to Tororo, Uganda without a co-driver and directed him to stop at 11pm but such time found him at an unsafe place, he opted to drive on. On his return journey, he got a call from the appellant accusing him of driving without stopping at 11PM as instructed and he admitted to such matter but on 11 February 2019 he was dismissed from his employment. Despite lodging an appeal on 8 February 2019 to explain the circumstances leading to his journeys and dangers faced, he was only paid Kshs. 54,208 in terminal dues. The claim was that there was unfair termination of employment and the respondent had claimed the following dues;
 - a. Notice pay Kshs. 33,546;
 - b. Severance pay for 6 years Kshs. 100,638;
 - c. Compensation at 12 months Kshs. 402,552;
 - d. Costs of the suit.



2. In response, the appellant's case before the lower court was that the respondent violated its policies by diverting off the designated route and also driving at night past hours put in place by the company despite being warned to rectify his conduct to no avail. The appellant invited the respondent to appear for disciplinary hearing on 11 December 2019, the hearing was held on 7 February 2019 which left the appellant with no option but to dismiss him with immediate effect. The terminal dues paid were Kshs. 54,208 inclusive of final dues for salary for 7 days, leave for 17 days for the year 2018 and 1.75 leave days in the year 2019 and one month notice pay.
3. In the judgment delivered on 16 June 2020 the trial court made a finding that there was unfair termination of employment and awarded the respondent notice pay and 6 months' compensation.
4. Aggrieved, the appellant filed this appeal on five (5) grounds and that the learned magistrate failed to appreciate the response in its totality and the provisions of Section 45(5) of the Act and that there were valid reasons leading to summary dismissal of the respondent and the judgment should be set aside with costs.
5. Parties agreed to address the appeal by way of written submissions.
6. The appellant submitted that in awarding the respondent notice pay, the trial court failed to appreciate that there was payment of Kshs. 54,208 which was inclusive of notice pay despite the summary dismissal. The appellant submitted the payment vouchers indicating the details with regard to the payment which matters were not taken into account, hence an erroneous finding.
7. The award of compensation was without justification because the respondent committed gross misconduct, he was taken through the due process and invited to a disciplinary hearing where he failed to give satisfactory reasons for his conduct of diverting from his given route contrary to given policy. The respondent admitted to having done this much and hence the summary dismissal was justified. The appeal should be allowed with costs.
8. The respondent submitted that the appeal is defective and filed contrary to rule 8 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#). The trial court delivered judgment on 16 June 2020 and in Misc. Application No. E038 of 2021 the appellant was allowed 21 days leave to file appeal failure to which such leave would lapse. The subject ruling is not filed herein making the appeal defective and should be dismissed. Hence the appeal is filed out of time.
9. On the substantive issues in the appeal, the learned magistrate analysed the evidence and made a proper finding that under Section 35 of the Act, no notice issued to the respondent before his employment was terminated hence the award of notice pay was justified. The appellant's evidence that the respondent was summoned for disciplinary hearing was without the respondent being privy to any accusations made against him resulting in unfair termination of employment and the award of compensation was justified and should be confirmed by the court and the appeal dismissed.
10. This being a first appeal, the court is required to re-evaluate the pleadings, the evidence and findings by the trial court and make own findings.
11. With regard to application of rule 8 of the [Employment and Labour Relations Court \(Procedure\) Rules, 2016](#) an appellant should file its appeal to the court within 30 days from the date the challenged judgment and decree issued.
12. Following judgment of the lower court on 16 June 2019, the appellant filed Misc. Application No. E038 of 2021 and on 7 July 2022 an order issued allowing the appellant 30 days to file its Record of Appeal failure to which such leave would lapse.



13. On 18 July 2022, the appellant filed the Memorandum of Appeal. This is a period of 11 days from the date the Order and leave to appeal out of time issued. There was mention on 26 October 2022 and the court gave directions on the appeal.

This is a proper appeal.

14. As outlined above, the claim before the trial court was that the respondent as a driver was sent on a journey to deliver goods to Totoro, Uganda on 1st to 7 February 2019. That he was required to stop at 11PM but the place was risky for him, the goods and vehicle and so, he decided to drive on to his destination. On 7 February 2019 he was invited to a disciplinary hearing to explain why he had not stopped as directed at 11PM. He admitted to such matter and this followed termination of employment.

15. On his own pleadings, the respondent noted that he took the allocated journey but failed to stop at 11PM as required by the employer.

16. Part of the judgment and analysis by the learned magistrate is that the respondent was allowed to attend a disciplinary hearing in the company of a shop steward and his evidence was that he did not do anything wrong to justify a dismissal.

17. The appellant's case was that the respondent was previously dismissed for transporting unauthorised goods but he pleaded for leniency and was reinstated back to his employment. Prior to 7 February 2019, the vehicle tracker in the vehicle driven by the respondent alerted the appellant that he had diverted from his route and travelled at night against company policy and which conduct he had been issued with warnings before.

18. The learned magistrate well assessed the evidence and the law and relied on section 41(2) of the Act which requires that before an employer can lawfully dismiss the employee, notice must issue and the employee allowed to attend disciplinary hearing. Save, upon this analysis, the court made a finding that no notice issued or reasons given for termination of employment. This is an erroneous finding.

19. Upon his admission that he diverted the motor vehicle allocated from its given route, that he drove after 11PM contrary to given instructions, the respondent was then invited to a disciplinary hearing where he attended with a shop steward. Under Section 41(2) of the Act, the full motions for a summary dismissal were well addressed.

20. The respondent was aware of the policy in place and the directions that he should stop driving at 11PM. He failed to do as directed. An employee who fails to abide the lawful instructions and directions of the employer is defined under Section 44(4) (c) and (g) to have committed gross misconduct. Having been invited to a disciplinary hearing and where the respondent attended in the presence of a shop steward, the appellant adhered to both procedural and substantive motions of the Act. Even though summary dismissal should have issued, the appellant opted for termination of employment and payment of notice, which was very lenient.

21. By his conduct, the admissions were sufficient evidence. Summary dismissal of the respondent was lawful and notice pay or compensation were not due.

22. In paying terminal dues, the appellant allocated the respondent Kshs. 54,208 and a voucher for the payment is attached in response to include the following tabulations;

a. Salary for 7 days,

b. Leave days for 17 days for the year 2018 and 1.75 leave days in the year 2019 and



- c. One month notice pay.
23. The payment of notice pay in a case where summary dismissal was justified was a generous payment to the respondent.
24. Even in a case where summary dismissal was not justified, which is not the case here, in assessing the compensation payable to the respondent, the learned magistrate ought to have considered the record of the respondent. He had previous warnings, he had been dismissed and when he pleaded leniency, he was reinstated back to his employment but soon thereafter engaged in gross misconduct. Such matters ought to have been put into account pursuant to Section 45(5) (e) read together with Section 74 (1) (l) of the Act that;
- (e) the existence of any previous warning letters issued to the employee.
- And;
- (l) of a record of warning letters or other evidence of misconduct of an employee; and ...
25. Without putting such matters into account, the award of 6 months' compensation is negated.
26. Accordingly, the appeal is found with merit, judgment and decree in Mombasa CM ELRC No. 265 of 2019 is hereby set aside in its entirety. Costs of the appeal awarded to the appellant.

DELIVERED IN OPEN COURT AT MOMBASA THIS 9TH DAY OF OCTOBER 2023.

M. MBARŪ

JUDGE

