



Solio Ranch Limited v Ngugi (Employment and Labour Relations Appeal E002 of 2022) [2023] KEELRC 2396 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2396 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E002 OF 2022
ON MAKAU, J
OCTOBER 6, 2023**

BETWEEN

SOLIO RANCH LIMITED APPELLANT

AND

REUBEN KARIUKI NGUGI RESPONDENT

(Being an appeal of the judgment and decree of the Chief Magistrate's Court at Nyeri before Hon. J. MACHARIA SPM delivered on 20th January 2022 in Civil Suit no. E417 OF 2021)

JUDGMENT

1. The Appellant employed the respondent on 20th December 2007 as an Accounts Assistant/Assistant Administration Manager for a monthly salary of Kshs.25,000. From 12th to 13th April, 2020 he proceeded for the Easter Holiday but on Sunday 12th April he received a call from the appellant requiring him to report to work on 13th Monday 2020. However, he indicated that he had travelled and therefore, he was not able to report back on 13th April 2020 as requested. When he reported to work on 14th April 2020, he was told to handover everything and proceed on leave without any written/formal leave sheet. At the end of April 2020, he never received any salary and upon enquiry, the Administrative Manager told him to consider himself terminated. No reason was cited and no disciplinary hearing was accorded to him.
2. As a result of the foregoing matters, he filed suit in the lower court seeking compensation for unlawful termination of his employment, terminal benefits and other reliefs. The appellant filed defence admitting the employment relationship and averred that it dismissed the respondent for abdicating his duties. It therefore prayed for the suit to be dismissed with costs.
3. During the hearing, only the respondent tendered evidence but the appellant did not attend court with its counsel despite being aware of the hearing dates. An attempt by the appellant to apply for the



reopening of the hearing of the suit before delivery of the judgment was rejected and the court went ahead to deliver the impugned judgment on 20th January 2022 awarding the respondent the following:

- I. Salary for 13 days worked until April Kshs. 12,500
 - II. 3 months' salary in lieu of notice Kshs. 75,000
 - III. Compensation for unlawful termination Kshs.150,000
 - IV. Gratuity for years served Kshs.173,077
 - V. Leave Kshs. 50,000
 - VI. 55 days (Sundays and Holidays) Kshs. 105,769
 - VII. Costs plus interests
4. The appellant was aggrieved and by a Memorandum of Appeal dated 6th March 2023 appealed against the said decision on the following grounds: -
- a. That the learned magistrate erred in law and fact by denying the Appellant an opportunity to be heard, which is against the cardinal rule of natural justice.
 - b. That the learned magistrate erred in law by rejecting the filing of a certificate of urgency before pronouncing judgement thus offending the principles of natural justice and infringing the Constitutional rights of the Appellant.
 - c. That the learned magistrate erred in law and fact in giving awards that were against and/or not supported by an evidence or at all.
 - d. That the proceedings as conducted were otherwise against cardinal rules of natural justice, unconstitutional, illegal and grossly unfair to the Appellant.
5. The Appeal seeks for the following reliefs:
- i. The judgment of the trial court be set aside and substituted with an order dismissing the suit,
 - ii. Costs of the appeal and lower court suit.
 - iii. Interest at court rates.
 - iv. Any other or further relief the court may deem fit to grant.

Submissions in the appeal

6. The Appellant collapsed the four grounds of appeal into one, that is, the trial court erred both in law and facts by denying it an opportunity to be heard, which is a cardinal rule of the natural justice. As such the appellant's constitutional rights were infringed. The Appellant argued that it made an Application to reopen the proceedings and be heard but the Court rejected application on ground that the judgement date had already been set. It maintained that it was condemned unheard contrary to the rules of natural justice.
7. The Appellant relied on Article 50(1) of *the Constitution* and the case of Republic v Chief Justice of Kenya & 6 others Ex-parte Moiyo Mataiwa Ole Keiwua [2010] eKLR where the Court held that persons who are affected by a proposed or likely action must be granted an opportunity to be heard as to why that action should be taken.



8. Finally, the appellant argued that the trial court awarded reliefs that were not supported by evidence. Therefore, it urged this Court to allow it with costs.
9. On the other hand, the Respondent faulted the Appellant for including Interlocutory Applications filed in this court in the record of appeal whereas the law requires that the Record of Appeal should consist of the happenings before the Trial Court only. He relied on Rule 8 (4) the Employment and Labour Relations Court (Procedure) Rules, 2016.
10. He equated the provision of Rule 8 (4) of this Court's Practice directions to that Order 42 Rule 13 (4) of the Civil Procedure Rules which provides that:

Rule 13(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say—

- (a) the memorandum of appeal;
- (b) the pleadings;
- (c) the notes of the trial magistrate made at the hearing;
- (d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;
- (e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;
- (f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal:

Provided that—

- (i) a translation into English shall be provided of any document not in that language;
- (ii) the judge may dispense with the production of any document or part of a document which is not relevant, other than those specified in paragraphs (a), (b) and (f).

11. The Respondent submitted that the inclusion of the documents filed in this Appeal was not inadvertent on the part of the Appellant but a sneaky move by the Appellant to introduce documents that ought not to form part of the Record. The said documents are contained in pages 32-45, 47-50, 62-63 and pages 70-84 of the Record yet they were not part of the record of the Trial Court's proceedings.
12. As regards the merits of the appeal, the Respondent submitted on grounds 1,2, and 4 of appeal together and contended that the appellant's allegation that it was denied an opportunity of being heard was not factual. He contended that the Claim was first filed on 13th July 2020 and the Appellant was served with the summons to enter appearance on 15th July 2020. However, it failed to enter appearance and judgement in default was entered on 13th August 2020 and a decree issued on 4th November 2020.
13. He further submitted that the Appellant was cajoled into action by the proclamation of its property and thus filed the application dated 25th November 2020 for stay of execution and setting aside the



ex-parte judgment. The parties filed a consent on 7th December 2020 setting aside the judgement and allowing the Appellant to file defence out of time.

14. He contended that the Appellant caused several adjournments of the hearing until 27th July 2021 when his case proceeded in the absence of the appellant's witnesses. The matter was then fixed for defence case on 14th September 2021 by consent but the appellant and his counsel failed to show up and the Court closed the hearing and directed the parties to file submissions.
15. The respondent submitted that the Appellant failed to file submissions, and instead filed another application to reopen the hearing. He submitted that the Appellant had adequate time to file submissions or even reopen the proceedings before the file was taken to chambers for purposes of judgement writing. He contended that, from 14th September 2021 when the hearing was closed and 15th November 2021 when the application was filed was two months. Therefore, he maintained that the Appellant was hell bent on derailing proceedings as opposed to seeking an opportunity to be heard.
16. In view of the foregoing matters, the respondent submitted that the Appellant was not denied right to be heard but rather it was indolent in the prosecution of its defense of its case as evident in the court record. He likened the Appellant's conduct to that of a person trying to lock the stable after the horse had bolted. He further submitted that the right to be heard was not absolute but subject to the rights of others. For emphasis, he relied on the case of *Pandya Memorial Hospital v Geeta Joshi* [2020] eKLR where the court of Appeal dismissed an appeal on grounds that the appellant had been given opportunity to call witnesses during the hearing but failed to do so.
17. On ground 3, the Respondent submitted that the Court awarded the reliefs based on the evidence that was tendered by him which was supported by law and the facts of the case. He further submitted that the Court considered the evidence that was produced in the witness statement, the documents produced as exhibits 1-5, as well as oral evidence in court. The said evidence was also tested through cross-examination and the Court found that the Appellant neither controverted the Respondent's evidence nor produce any evidence to prove of its case.
18. The Respondent submitted that the Court granted 6 months compensation instead of the 12 months that he had sought. Finally, he submitted that the Appellant has failed to point out any award that was not supported by the facts so as to warrant interference by this court. Consequently, he prayed for appeal to be dismissed with costs.

Analysis and determination

19. I have considered the Memorandum of Appeal, and the submissions by the parties and it is a fact that the Respondent was an employee of the Appellant. It is also a fact that employment was terminated by the Appellant giving rise to the suit subject matter of this Appeal. It is further a fact that the respondent was not heard in the suit before the judgment was passed against it by the trial court. The issues for determination in the Appeal are: -
 - a. Whether the Appellant was denied the right to be heard?
 - b. Whether the Trial Court awarded reliefs not supported by law or evidence?
 - c. Whether the Appellant is entitled to the reliefs sought?

Whether the Appellant was denied a right to be heard?

20. The Appellant's appeal is premised on the fact that the Appellant's application to have the proceedings reopened was disregarded by the Court and the court proceeded to deliver its judgement on 20th



January 2022. The Respondent has narrated, in his submissions, the history of the proceedings before the trial court and I have verified the same from the court record. It is clear that the Appellant was granted a chance to file Defence out of time. Thereafter the appellant occasioned adjournment of the hearing on 20th April 2021, and on 27th July 2021 when the respondent gave evidence and closed his case. On 14th September 2021, the suit came up for defence hearing but the appellant and its counsel failed to attend the hearing and the hearing was closed.

21. In view of the foregoing, can the appellant rightly accuse the trial court of denying it the right to be heard during the trial? The answer is in the negative. I say so because the court record bears witness against the appellant that it was given an opportunity to present its evidence but failed to do so.
22. The right to a fair trial is enshrined under Article 50 of *the Constitution* whereas the duty of the Court to do justice is enshrined in Article 159 (2). However, in performing its mandate under the law the court ought to exercise discretion in a manner that ensures that justice is done to all.
23. The question that arises therefore is whether the rejection of the Appellant's Application amounted to an injustice or was justified move by the Court in ensuring justice to all. I think it did not amount to injustice or denial of the right to hearing in the suit. The Appellant had been granted a chance to defend the suit and a default judgement entered against it was set aside by consent. It was also given three chances to adduce evidence but it failed to procure its witnesses and also absconded court on the 14th September 2021. Consequently, I find and hold that the appellant was never denied the right to be heard in his defence case by the trial court.
24. In my view, a party can only be said to have been condemned unheard where it is demonstrated that a matter affecting them was decided in their absence and without being accorded an opportunity to defend himself. In this case, the Appellant was not diligent at any stage of the proceedings and therefore it suffered the consequences of its own negligence after being accorded the right to be heard.

Whether the Trial Court awarded reliefs not supported by law or evidence?

25. The Court in its Judgement dated 20th January 2022 awarded the Respondent reliefs as reproduced in the background of the case where the reliefs totaled to Kshs. 566,346/= together with costs and interest. The claims were all supported by the Appointment letter which expressly provided for the terms of employment. They were also supported by the Payroll which indicates that the Respondent was receiving net pay of Kshs. 25,000/= for a period of 26 days. The Respondent was in the service of the Appellant for 12 years hence as per the appointment letter, he was entitled to 15 days' pay gratuity for every completed year of service.
26. However, I have an issue with the award of twelve months' salary as compensation for unlawful termination. The trial court never gave any justification for that discretionary award as required under section 49(4) of the *Employment Act*. I seek support from *Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others* (2018) eKLR where the Court of Appeal held that:-

“...the less the violation of an employee's rights that accompany his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and dignity of an employee who is being dismissed. Award of the full twelve months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee jerk award for every and any case of unfair dismissal.”



27. The same court has held that, an appellate court has the right to interfere with the discretionary award where the trial court has failed to consider a relevant factor which ought to have been considered. In the case of *Butt v Khan* [1978] eKLR the Court of Appeal held as follows:

“An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low.”

28. In the instant case I find that the respondent served for twelve years and no evidence was adduced to prove that he had a history of misconduct that contributed to his dismissal. The manner in which he was dismissed was egregious because he was first sent on compulsory leave, then denied his salary and when he enquired about his salary, he was told to consider himself as dismissed. Such conduct by the employer towards its employee has no place in the present constitutional paradigm.

29. Such conduct epitomizes violation of the employee’s right to be treated with dignity, right to fair labour practices, and right to fair administrative action as envisaged in Article 28, 41 and 47 of *the Constitution* and applied under the *Employment Act* and the fair Administrative Actions Act. Consequently, on the basis of long service and the bad manner in which the dismissal was done, the respondent is entitled to the maximum 12 months salary as compensation for the unlawful termination.

Whether the reliefs sought in the appeal are merited?

30. Having found that the Appellant has not convinced this Court that its right to a fair trial was infringed or that the Court did not exercise its discretion judiciously in the determination of the suit, I find that this Appeal lacks merit and is therefore dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF OCTOBER, 2023

ONESMUS.N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

