



REPUBLIC OF KENYA



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**New Wide Garments EPZ (K) Limited v Syombua (Appeal E151 of 2021)
[2023] KEELRC 3437 (KLR) (20 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3437 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E151 OF 2021
NZIOKI WA MAKAU, J
NOVEMBER 20, 2023**

BETWEEN

NEW WIDE GARMENTS EPZ (K) LIMITED APPELLANT

AND

EUNICE KAVESU SYOMBUA RESPONDENT

(Being an appeal Being an appeal against the judgment of the Hon. D.O Mbeja, Principal Magistrate delivered on the 29th day of October 2021 in Nairobi Millimani Chief Magistrates Court's E&LR Case No. 1111 of 2019)

JUDGMENT

1. The Appellant has appealed against the judgment of Hon. D.O. Mbeja, Principal Magistrate delivered on 29th October 2021 in Nairobi Chief Magistrate's Court E&LR Case No. 1111 of 2019 between the parties. The Appellant sought in the grounds in the memorandum of appeal that:-
 - a. The learned trial magistrate erred in law and in fact in holding that the Respondent had been unfairly and wrongfully dismissed from employment yet there was no evidence in support of such a finding.
 - b. The learned trial magistrate erred in law and in fact in holding that the Respondent had been unfairly and wrongfully dismissed from employment yet there were sufficient evidence to show that she was on a short term contract and her contract of employment ended on 14th August 2018.
 - c. The learned trial magistrate erred in law and in fact in awarding the Respondent salary for the month of August 2018 yet there was evidence that the Respondent had been paid the same.



- d. The learned trial magistrate erred in law and in fact in awarding the Respondent salary for the month of September 2018 yet there was evidence that the Respondent did not work for the Appellant in the said month, her contract of employment having lapsed on 14th August 2018.
 - e. The learned trial magistrate erred in law and in fact in awarding the Respondent overtime yet the Respondent did not adduce any evidence in support of the same.
 - f. The learned trial magistrate erred in law and in fact in awarding the Respondent compensation equivalent to twelve (12) months salary yet the Respondent;
 - i. Did not establish that she had been unfairly and wrongfully terminated,
 - ii. Was on short term contract which lapsed on 14th August 2018,
 - iii. Did not have a legitimate expectation to work for the Respondent beyond 15th August 2018, and
 - iv. Had worked for the Appellant for only six (6) months.
2. The Appellant prayed that the appeal be allowed with costs to the Appellant and the judgment delivered by the learned trial magistrate on 29th October 2021 be set aside. The Appellant sought that the Respondent's claim dated 16th May 2019 be dismissed with costs to the Appellant. The Appeal was disposed of by way of submissions and as the time of writing the judgment, only the Appellant had filed and placed their submissions on the Court file.
 3. The Appellant submits that this being the first appeal, this Court is entitled to examine the evidence and the record before the trial court and come up with its independent findings on the same. On this proposition, the Appellant relies on the case of *Jackson Kaio Kivuva v Penina Wanjiru Muchene* [2019] eKLR where the Court held as follows:-

“This being a first appeal, parties are entitled to and expect a rehearing, re-evaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and therefore give due allowance for that.”
 4. The Appellant submitted that in the case of *Abok James Odera T/A J. Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows regarding the duty of a first appellate court: -

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way...”
 5. That further, in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated thus:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions, though



it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect."

6. The Appellant invited this court to arrive at its own conclusion on the matter after examining all the circumstances of the case including the record, the proceedings and the judgment rendered by the trial court. The Appellant submitted that the Respondent's contention before the trial court was that the Appellant failed to notify her of its intention to terminate her services, failed to follow due process before dismissing her and failed to pay her terminal dues. It was the Appellant's case that the Respondent was on a short-term fixed contract of employment, the contract of employment ended on 14th August 2018 and thus no termination of employment took place. The Appellant submitted that it did not promise the Respondent that it would renew her contract. The Appellant asserts that the Respondent's contract ended by effluxion of time. It cited the case of *Eunice Wanjiru Waitbaka v Thomson Falls Lodge* [2015] eKLR where the Court held:

"Considering that the Claimant was on a time bound contract and which she served until the last day and that she did not seek for renewal, the Court reaches the conclusion that the contract lapsed by effluxion of time. Therefore, the case at hand is not one of unfair termination/wrongful dismissal from employment...

The commencement of the Claimant's maternity leave commenced on the expiry of her contract and therefore she has no legally tenable claim against the Respondent in this respect."

7. The Appellant submitted that even if the Respondent's contract of employment was unlawfully terminated, which the Appellant denied, the award of twelve (12) months' salary as compensation is unreasonable and excessive under the circumstances because the Respondent (Claimant) had worked for the Appellant (Respondent) for six (6) months only at the time of the alleged wrongful termination.

The Appellant submitted that in determining a complaint for unfair termination, section 50 of the *Employment Act* enjoins the court to consider the provisions of section 49 and that some of the factors to take into consideration under section 49(4) are the length of service with the employer, the expectation of the employee as to the length of time for which employment might have continued and whether the employee's conduct contributed to the termination. The Appellant submitted that if the court is inclined to grant any remedy then it should be confined to 2 months salary which would be adequate compensation. The Appellant cited the cases of *Gladys Chelimo Bii v Kenya Power and Lighting Company Limited* [2021] eKLR where the claimant had worked for the respondent for a period of eleven (11) months. The court awarded the claimant two (2) months salary as compensation for unlawful termination; *Stephen Ndaiga Wagana v Ambassadeur Hotel* [2012] eKLR, where the claimant had worked for the respondent for a period of five (5) years at the time of his dismissal. The court awarded him three (3) months salary as compensation for unlawful dismissal; and the case of *Wambua v Newlight Schools Limited (Cause 475 of 2018)* [2023] KEELRC 531 (KLR), where the claimant had worked for the respondent for five (5) years, the court awarded him three (3) months salary as compensation for unlawful dismissal. The Appellant urged the court to set aside the judgment of the trial court and allow the Appellant's appeal.

8. The Court had sight of submissions filed on the online portal by the Respondent though these were not paid for. In her submissions, the Respondent submitted that the issues for determination were whether the termination of her employment by the Appellant was procedural and whether the Respondent was correctly awarded the damages by the trial court. The Respondent cited sections 43 and 45 of the *Employment Act* and submitted that she had done nothing wrong to warrant the dismissal, no notice was issued before the decision to summarily dismiss her was reached, no plausible



reason was given for her dismissal, due process was ignored in the haste to summarily to dismiss her and that the decision to dismiss her was harsh, inhumane, unwarranted and unjustified considering that she had served the Appellant with dedication and without blemish. The Respondent submitted that her contract with the Appellant dated 15th February 2018 which was to end on 14th August 2018. The Respondent submitted that on 21st June 2018, she applied for maternity leave which was granted by the Appellant indicating the Respondent was to resume work on 20th September 2018.

9. The Appellant seems to have altered the end of employment for the Respondent. Vide a maternity leave sheet copy whereof was availed at page 32 of the record of appeal, the Respondent was set to have 3 months maternity leave and was to report on 21st September 2018. By dint of this leave sheet, the Respondent was entitled to assume as she did, that her employment with the Respondent would be extended beyond her expected end of contract. The Appellant asserts it recalled the said maternity leave sheet and reissued the Respondent with another. The other maternity leave form has a signature that does not resemble the signature the Respondent used when in the employ of the Appellant and is at best suspect. It follows therefore that the termination after provision of maternity leave that went beyond the expected date of termination of contract was in effect an extension of the contract. The Respondent was therefore entitled to be given reason for the change of heart. The Appellant did not bother to write to the Respondent and left the matter for interpretation by the court and in reading the judgment of the learned Principal Magistrate, I see no misdirection in the appreciation of the changed circumstances brought about by the Appellant's own conduct. The quantum given was 12 months for the unfair termination and though the Respondent was only at the Appellant's for 6 months, the sum awarded would be upheld as the Appellant's HR told the Respondent to go and wait for a call for her to resume work after she returned on 21st September 2018. Having led her to believe there was employment in the offing the award of 12 months accords with the reasons one has to consider before awarding compensation under section 49 of the [Employment Act](#). As such, the Court finds in favour of the Respondent. The appeal is accordingly dismissed albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF NOVEMBER 2023

NZIOKI WA MAKAU

JUDGE

