



**Veteran Pharmaceuticals Limited v Ngeresa (Employment and Labour Relations Appeal E052 of 2022) [2023] KEELRC 2919 (KLR) (10 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2919 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E052 OF 2022  
NJ ABUODHA, J  
NOVEMBER 10, 2023**

**BETWEEN**

**VETERAN PHARMACEUTICALS LIMITED ..... APPELLANT**

**AND**

**JEREMIAH MINYIRA NGERESA ..... RESPONDENT**

*(Being an appeal from the judgment and decree of Hon. S.A OPANDE (Mr)(PM) issued in Chief Magistrate's Court at Milimani CMEL No.E583 of 2022 between Jeremiah Minyira Ngeresa v Veteran Pharmaceuticals issued on 24th March 2022)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 24<sup>th</sup> April 2022, the Appellant appeals against the Judgment of Honourable S.A OPANDE (Mr)(PM) delivered on 24<sup>th</sup> March 2022) in Milimani CMEL No.E583 of 2022 (Jeremiah Minyira Ngeresa v Veteran Pharmaceuticals).
2. The Appeal was based on the grounds that:
  - i. The Learned Magistrate erred in law by allowing the Respondent's claim with costs..
  - ii. The Learned Magistrate erred in law and in fact by finding that the Respondent was terminated and his termination was unfair and unlawful.
  - iii. The Learned Magistrate erred in law and in fact by finding that the Respondent was entitled to 15% house allowance whereas his salary was consolidated.
  - iv. The Learned Magistrate erred in law and in fact awarding the Respondent one Month's Salary in lieu of notice.



- v. The Learned Magistrate erred in law and in fact by awarding the Respondent six Month salary as compensation for unfair and unlawful termination.
3. The Appellant prayed that the appeal be allowed and the Judgment and decree of the Subordinate court dated 24<sup>th</sup> March 2022 be set aside and substituted with a judgment and decree of this court of dismissing the Respondent's claim with costs.
  4. The Appeal was disposed of by written submissions.
  5. The Appellant in its submissions dated 16<sup>th</sup> June, 2023 submitted that the Respondent in his testimony stated that he was at work on 10.2.2020 when he was called to human Resource Manager's office and terminated yet the call logs produced by the appellant during trial showed that the Respondent was not at work on the said date. The respondent never reported back to work after his sick off which ended on 22<sup>nd</sup> February, 2020.
  6. The Appellant further submitted that the Respondent did not advance any proof of unfair termination as required by section 47(5) of the Employment Act. He did not advance any reason why he did not report to work on 22<sup>nd</sup> February, 2020 when his sick off lapsed. This according to the appellant amounted to absconding duty and warranted summary dismissal under section 44(4) of the Employment Act yet he was not terminated. The claimant was therefore not entitled to one month pay in lieu of notice as awarded by the subordinate court. The appellant relied on the case of Peter Mutua Muindi v Ansaldi Roberto[2022] eKLR where Lady Justice Monica Mbaru refused to compensate the Claimant for absconding of duties.
  7. It was the Appellant's submission while relying on section 45(5)(b) of Employment Act that the court should consider the conduct of the employee before termination and submitted that since October 2019 to 22<sup>nd</sup> February, 2020 the Respondent only worked for a total of 18 days but he received his full pay for the period of four Months and allowed sick off to seek medical attention. Under section 30 of the Employment Act, only 7 days of sick leave with full pay is allowed and thereafter 7 days sick leave with half pay for every 12 months worked. The Respondent had worked for 3 years 7 months and was only entitled to 21 days sick leave with half pay but the Appellant did not enforce this but paid the respondent in full. The Appellant therefore urged the court to set aside the six month's salary compensation since the respondent absconded duties.
  8. On the issue of House allowance the Appellant submitted that this award by lower court was erroneous and relied on section 31 of the Employment Act to submit that the Respondent was paid a consolidated salary which was inclusive of house allowance as per clause 4 of the contract signed by the parties. The appellant relied on the case of Joseph Sani Orina v Hiprora Business Solution(EA) Limited[2017] eKLR
  9. The Appellant therefore prayed that the lower court's judgment and decree to be set aside and the Respondent's claim be dismissed.
  10. On the other hand, the Respondent filed his submissions dated 25<sup>th</sup> July, 2023 and submitted on the role of the first appellate court which was to re-evaluate, re-analyze and re-appraise the facts and evidence and come up with its own conclusion. The respondent relied on the case of Moses Odhiambo Muruka & Another v Stephen Wambembe Kwatenge & Another[2018] eKLR.
  11. On the issue of allowing the claim with costs, the respondent submitted that this was not true because section 27(1) of the Civil Procedure Act and Rule 28(1)(e) of the Employment and labour Relations Court(Procedure) Rules 2016 empowers court while exercising its discretion to award costs to a successful litigant.



12. On the issue of the unfair termination the Respondent submitted that on 22<sup>nd</sup> February, 2020 he was terminated from employment by the Appellant without any cause. Section 45(2) (a) of the *Employment Act* places evidential burden on employer to prove that the reason for termination was valid and that the procedure used in the termination was a fair procedure, failure to which the termination would be declared unfair and unlawful. The respondent in this regard relied on the case of *Evans Kamadi Misango v Barclays Bank of Kenya Limited*[2015] eKLR.
13. It was further the Respondent's submission that despite the Appellant's witness testifying that the Respondent did not show up for work from 22<sup>nd</sup> February, 2020 and therefore absconded duties, they did not produce any documentation to prove that they attempted to contact the Respondent after he absconded and relied on the case of *Simon Mbithi Mbane vs Inter security services Ltd*(2018) EKLR.
14. The Respondent also relied on the case of *Walter Anuro vs Teachers Service Commission*(2013) eKLR on both substantive justification and procedural fairness on validity of the reason for termination and submitted that the procedure employed by the Appellant offended the provisions of Section 41 of the *Employment Act* hence the termination was unlawful and unfair.
15. On the issue of 15% house allowance the Respondent submitted that his salary as per attached pay slip did not include house allowance and relied on section 74 (1) (i) of the *Employment Act* to submit that he was paid a basic salary of Kshs 30,000/= at the time of termination of his employment and house allowance was not particularized in the pay slip hence not paid.
16. On the issue of one month salary in lieu of notice the Respondent submitted that the trial court having found that the Respondent was terminated unfairly without payment of one month notice, it was right to award the same to him and relied on section 36 of the *Employment Act*.
17. On the issue of six months compensation the Respondent submitted on general principles when appellate court may interfere with a discretionary power of a trial court and relied on the cases of *Stephen Mwallyo Mbondo v County Government of Kilifi*[2021] eKLR and *Patel v EA. Cargo Handling services Limited*[1974] E.A 75 that the court will only interfere if the trial court misdirected itself hence arriving to an erroneous decision and in varying the decision the appellate court ought to be just and that there was no need to interfere with the award of lower court since parties were heard and a decision reached.
18. In conclusion the Respondent submitted that the trial court exercised its discretion judiciously and the court should uphold the same.

### **Analysis & determination**

19. The duty of a first appellate court was well stated in the Court of Appeal in *Selle v Associated Motor Boat Company Limited* [1968] E.A 123 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 allowance in this respect. In particular, 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 or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”



20. In determining the Appeal herein, this Court shall similarly seek to re-analyze the evidence tendered before the Trial Court vis-à-vis the court's conclusion and disposition.
21. In this case, the judgment of trial court was as follows;
  - a. one month's pay in lieu of Notice –Kshs 34,500,000/=
  - b. House Allowance-Kshs 131,400/=
  - c. Six month's compensation for unlawful and unfair termination–Kshs 207,000/=Total Kshs 372,900/=
  - d. Certificate of service
  - e. Costs and interests of the suit.
1. The undisputed facts were that the Respondent was employed by the Appellant as a rider on or about 2<sup>nd</sup> June, 2016 at a starting basic salary of Kshs 18,000/= and later increased to Kshs 30,000/= until February 2020.
2. From the grounds in the memorandum of Appeal, the issues for determination seem to be:-
  - a. Whether the Respondent's employment was unfairly terminated.
  - b. Whether the trial court erred by awarding house allowance and one month's pay in lieu of notice to the Respondent.
  - c. Whether this court should interfere with the discretion of lower court of awarding six months compensation to the Respondent.
  - d. Whether the Respondent's employment was unfairly terminated
24. The Respondent alleged that on 22<sup>nd</sup> February, 2020 he was terminated verbally when he reported to work. The Appellant maintained that the Respondent was not at work on 22<sup>nd</sup> February, 2020. He never reported back to work after his sick off.
25. It was not disputed that the Respondent sought a number of sick offs in order to recuperate yet it was the Appellant's assertion that the Respondent absconded from duty. The Appellant did not produce any warning letters to the respondent over absconding duties or evidence of any effort to contact him as to why he was absconding duties. The court therefore finds that the reason of absconding duties given by the Appellant was not a valid one.
26. It is noteworthy that the reason for termination must be a valid and fair one as provided for under section 43 of the *Employment Act* and the duty to prove the grounds for termination lies with the Employer under section 47(5). Although absconding of duties falls under categories of gross misconduct under section 44(4) of the *Employment Act* the Respondent ought to prove this reason before relying on it as a ground for termination.
27. In *Simon Mbithi Mbane vs Inter Security Services Ltd(2018) eklr* cited by the Respondent this court held that;

An allegation that an employee has absconded duties calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success.



28. In this case failure to demonstrate that an employee who had worked for the Appellant for more than 3 years without any history of absconding duties actually absconded work, leads to the inference that the Appellant terminated the services of the Respondent without any valid reason.
29. In the case of Prof. Macha Isunde vs Lavington Security Guards Limited [2017] eKLR, the Court of Appeal stated:
- “There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – prove that the grounds are justified (section 47 (5), among other provisions mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
30. From the above case it is clear the Appellant was bound to prove the reason for termination in this case that the respondent absconded duties. The Court from the foregoing comes to the conclusion that the appellant failed to discharge this statutory burden of proof. The trial Court was therefore justified in so finding.
- Whether the trial court erred by awarding house allowance and one Month’s pay in lieu of notice to the Respondent
31. In this respect, the Court will be guided by the employment contract which the parties signed. Under clause 4 it provides that the Respondent’s gross salary was Kshs. 18,000 which was increased to Kshs. 30,000/=. The Court has also looked at the pay slips attached and noted that there was no mention of house allowance. The lower court therefore erred in awarding housing allowance. In the case of Sani Orina v Hiprora Business Solution (EA) (2017) eKLR the court held that;
- Gross salary as opposed to basic salary usually includes house allowance and other allowances paid by an employer and include basic pay.
32. On the issue of one month’s pay in lieu of notice, having found that the Respondent was unfairly terminated, this award was justified under section 36 of the *Employment Act*.

**Whether this court should interfere with the discretion of lower court of awarding six months compensation to the Respondent.**

33. The trial court exercised its discretion and awarded the Respondent six months’ salary as compensation for unfair termination. The Court also took in to consideration that for the four months the Respondent was in and out of Hospital the Appellant paid his salary in full which the Court agrees was good labour practice but having found that the Appellant unlawfully terminated, the trial court’s exercise of discretion in this regard was reasonable. This court as an appellate court can only interfere with exercise of discretion by a lower court if it is apparent that the trial court misapprehended the facts leading to an erroneous decision. In the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR the court held;
- “The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest



from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.”

34. In conclusion the Court hereby allows the Appeal in part as shown below

- a. One Month’s payment in lieu of Notice Kshs.30,000/=
  - b. 6 months compensation for unfair termination Ksh.300,000/=
- Total Kshs 330,000/=
- c. Costs and interests of the suit and this appeal.

35. It is so ordered

**DATED AT NAIROBI THIS 10TH DAY OF NOVEMBER, 2023**

**DELIVERED VIRTUALLY THIS 10TH DAY OF NOVEMBER, 2023**

**ABUODHA NELSON JORUM**

**JUDGE**

