



**Sauti ya Rehema Radio & Television Network Ltd v Ephraim Oduor Ochieng
(Appeal E029 of 2023) [2023] KEELRC 2788 (KLR) (8 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2788 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E029 OF 2023
S RADIDO, J
NOVEMBER 8, 2023**

**BETWEEN
SAUTI YA REHEMA RADIO & TELEVISION NETWORK LTD APPELLANT
AND
EPHRAIM ODUOR OCHIENG RESPONDENT**

*(Being an Appeal from the judgment of Honourable S.N. Abuya
delivered on the 25th April 2023 in Kisii CM ELRC No. 19 of 2020)*

JUDGMENT

1. Ephraim Oduor Ochieng (the Respondent) sued Sauti Ya Rehema Radio & Television Network Ltd (the Appellant) before the Chief Magistrates Court, Kisii alleging unfair termination of employment.
2. In a judgment delivered on 25 April 2023, the Chief Magistrate found the termination of the Respondent's employment was unfair and awarded him the equivalent of 6 months' wages as compensation, 1-month pay in lieu of notice and salary arrears.
3. The Appellant was dissatisfied and it lodged a Memorandum of Appeal with the Court on 22 May 2023 contending:
 - i. That the learned trial Magistrate erred in law and fact by holding that the Respondent was summarily dismissed without valid grounds and did not follow a fair procedure despite evidence that the Respondent deserted duty for a long time without information on his whereabouts.
 - ii. That the learned trial Magistrate erred in law and in fact by awarding the Claimant 6 months' gross salary as compensation for unfair/unlawful dismissal when unfair dismissal was not proved by the Respondent.



- iii. That the learned trial Magistrate erred in law and fact by failing to consider the written communication to the Respondent calling upon him to resume duty and that he failed to respond nor clear.
 - iv. That the trial Magistrate erred in law and fact by failing to hold that the Respondent had constructively resigned from employment by leaving his work and radio station unmanned for a long time.
 - v. That the learned trial Magistrate erred in law and in fact by awarding Kshs 174,800/- as salary arrears which amount was not proved by the Respondent.
 - vi. That the trial Magistrate erred in law and fact by failing to consider the Appellant's submissions and authorities in support thereof thereby arriving at an unfair decision.
4. On 23 May 2023, the Court granted an interim stay of execution on condition that the Appellant deposited the decretal sum in Court, and the Court gave further directions on 30 May 2023, 31 May 2023 and 21 September 2023.
 5. The Appellant filed the Record of Appeal on 18 September 2023.
 6. The Appellant filed its submissions on 12 October 2023, and the Respondent filed a Supplementary Record of Appeal on 25 October 2023 containing the parties' submissions before the subordinate Court.
 7. The Respondent filed his submissions on 3 November 2023.
 8. In the submissions, the Respondent made reference to a Cross-Appeal which the Court has not been able to trace from the record.
 9. The Court has considered the Record and submissions.

Role of the Court on first appeal

10. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150, where it was held that:

this being the first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
11. The Court will keep the interdict in mind.

Unfair termination of employment

12. The Respondent's case before the Magistrates Court was that the Appellant was not paying salaries as they fell due and that on 13 March 2020, when he requested for salary arrears, the Appellant's Manager called Douglas instructed him to go home and wait to be paid when funds became available.
13. According to the Respondent, he later that he had been replaced by a student he had trained and this confirmed his fears that his employment had been terminated.
14. The Respondent asserted that he was not allowed an opportunity to be heard as envisaged by section 41 of the *Employment Act* before the termination.



15. The Appellant's version was the opposite. It contended that the Respondent had deserted work from around 10 February 2020 and that it wrote to him on 4 March 2020 asking him to report back work but he did not.
16. In finding that the Appellant had unfairly terminated the Respondent's employment and that he had not deserted duty, the Chief Magistrate noted that the Appellant had not produced any records/show cause addressed to the Respondent asking him to explain why he was not reporting to work.
17. The Respondent caused his advocate to write a formal demand to the Appellant alleging unfair termination of employment.
18. The Appellant responded to the demand expressing surprise and indicating that the Respondent was still its employee.
19. In the letter of response, the Appellant indicated that attempts to reach the Respondent had been futile and that it was ready to pay any outstanding dues upon the Respondent clearing.
20. During oral testimony, the Appellant's witness stated that the Respondent collected the letter from the office but in the response to the formal demand, it was indicated that the Respondent had not been seen in the office after allegedly deserting.
21. The versions taken by the Appellant in the letter and oral testimony were contradictory.
22. Failure to report to work without permission or lawful cause is a breach of contract. It is a misconduct. The Respondent was a radio production assistant and he doubled up as an announcer.
23. If indeed it is true that he deserted duty, considering the nature of his duties, the least the Appellant should have done was to seek to know about his whereabouts or issue a show-cause calling on him to explain his absence and accept the repudiation of the contract of employment (see *Societe General, London Branch v Geys* (2012) UKSC 63 on the principles applicable where a party repudiates an employment contract).
24. The Appellant failed to show before the Chief Magistrate that it sent any such notice to the Respondent.
25. When the Respondent's advocate sent a formal demand to the Appellant on 8 June 2020, the Appellant expressed shock in its reply and even stated that the Respondent was still its employee.
26. The Appellant admitted before the Chief Magistrate that it was facing financial difficulties at some point. The Respondent's testimony therefore that he was instructed to leave when he demanded for salary arrears appear plausible.
27. This Court finds that the Chief Magistrate did not fall into an error of law or fact in finding that this was a case of unfair termination of employment and not desertion.

Award of compensation

28. The Chief Magistrate awarded the Respondent the equivalent of 6 months' gross wages as compensation.
29. The Chief Magistrate did not state which of the factors outlined in section 49(4) of the [Employment Act, 2007](#) she had considered.
30. That was an error of both law and fact.



31. An award of compensation is a discretionary power exercised within the parameters set out in section 49(4) of the *Employment Act*, 2007. The Respondent served the Appellant from 2016 up to 2022, a period of about 4 years.
32. Considering the length of service, the Court is of the view that the award of 6 months' gross wages as compensation was not out of line or a wrong exercise of discretion.

Salary arrears

33. The Chief Magistrate awarded the Respondent salary arrears of Kshs 174,000/-. The Appellant lamented that this head of the claim was not proved.
34. The Appellant's witness testified during cross-examination that vouchers used to pay the Respondent were available but had not been placed before the Court.
35. During re-examination, the witness admitted that the Respondent was owed salary arrears of Kshs 174,800/- and that is the amount which was allowed out of the claimed Kshs 394,000/-.
36. The Appellant cannot run away from that admission.

Conclusion and Orders

37. From the foregoing, the Court finds no merit in the Appeal and it is dismissed with costs to the Respondent.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KERICHO ON THIS 8TH DAY OF NOVEMBER 2023.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Manani, Lilan, Mwetich & Co. Advocates

For Respondent Nyamurongi & Co. Advocates

Court Assistant Chrispo Aura

