



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT MOMBASA

APPEAL NO. E071 OF 2021

(Being an appeal from part of the judgment of Honourable Omido J.M , Senior Principal Magistrate delivered on 15.09.2021 ELRC No. 13 of 2019 at Kwale Chief Magistrate's Court, Bongo Mwamwero Ngome –Versus- South Coast Paints & Hardware)

MAAWIYA ALI ABDALA T/A SOUTH-COAST PAINT & HARDWARE.....APPELLANT

- VERSUS -

BONGO MWAMWERO NGOME.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 25th February, 2022)

JUDGMENT

The appellant filed the memorandum of appeal on 14.10.2021 through Muriithi & Masore Law. The appellant is dissatisfied with part of the judgment delivered by the trial Court on 15.09.2021 upon the following grounds:

- 1) The learned Magistrate erred in law and in fact by holding that the appellant unfairly terminated the respondent from employment notwithstanding:
 - a) The respondent failed to report on duty on 20.08.2018 without the consent of the appellant or the respondent's supervisor.
 - b) The appellant demonstrated incessant efforts to contact the respondent to report to work, albeit unsuccessfully.
 - c) Contacting the respondent on phone No.+254724xxxx to enquire about the respondent's whereabouts.
 - d) Contacting the respondent's father whom the respondent had disclosed as next of kin on phone No. +254728xxxx.
 - e) Notifying the labour officer of the respondent's desertion of duty after a month of incessant, albeit unsuccessful attempts to contact the respondent.
 - f) Getting the sanction of the labour officer to strike off the respondent's name from the appellant's payroll after demonstrating, to the satisfaction of the labour officer that the respondent had no intention of resuming back to work.
 - g) The respondent did not produce in evidence a certificate of incapacity to work by a qualified medical practitioner to support his allegation that he was admitted at hospital hence unable to report for duty.
 - h) The respondent was inconsistent on when the termination took place, how the termination was communicated to him, and whoever effected the termination.
- 2) The learned Magistrate erred in law and in fact by holding that the respondent succeeded in his claim against the appellant on a balance of probabilities notwithstanding:
 - a) The respondent's testimony was inconsistent with his statement of claim that was accompanied by an affidavit verifying the facts therein and written statement on the occupation and roles the appellant assigned to the respondent in the course of the subject employment; payment of the loan balance of Kshs. 25, 000.00 owing and due to the respondent; payment of house allowance; payment of salary for August 2018; legibility as a driver under Traffic Act, Cap 403; and when, how, and who effected the termination of the subject employment.

b) The learned Magistrate did not fault the appellant's evidence in support of his statement of response and counterclaim.

3) The learned Magistrate erred in law and in fact by awarding the maximum compensation for unfair termination being the equivalent of 12 months' pay by failing to consider that the respondent absented himself from duty without appellant's consent; the respondent tried to contact the claimant and his father to resume duty but unsuccessfully so; the labour officer was informed about the claimant's desertion; the labour officer authorised the appellant to strike off the respondent from the pay roll; the respondent offered no mitigation consequential to the alleged losses as a result of the termination of employment; the respondent invoked incapacity to work on account of sickness but gave no certificate of such incapacity by a duly qualified medical practitioner to verify the allegation of sickness; and failure to consider that the counterclaim was partly successful.

4) The learned Magistrate erred in law and in fact by awarding a month's pay in lieu of notice of termination of employment notwithstanding that respondent deserted duty without consent of the appellant; the appellant unsuccessfully traced the respondent to resume duty; and the labour officer granted approval the respondent is struck off the payroll.

5) The learned Magistrate erred in law and in fact by awarding costs to the respondent for the sole reason that the respondent allegedly largely succeeded in the suit whereas only Kshs. 157,000.00 had been awarded out of a claim of Kshs. 773, 512.96 that was claimed.

The appellant prayed for orders:

- 1) The appeal is allowed.
- 2) The judgment in favour of the respondent is set aside.
- 3) Judgment be entered for the appellant's statement of response and counter claim filed 10.01.2020.
- 4) The order by the learned Magistrate on costs be set aside.
- 5) The appellant be awarded the costs of the appeal and in the lower Court.

The background to the appeal is as follows. The respondent filed the memorandum of claim on 31.10.2019 through Abdiwahid & Associates Advocates. The claimant pleaded that the respondent employed him on continuous basis as a salesman from 2010 to August 2018. Further, in 2010 the respondent's roles were extended to that of a driver at the respondent's other company known as Lela Books and Stationery. The claimant's gross salary was Kshs. 14, 000.00. Further, the respondent's employment was wrongfully, unprocedurally, and unlawfully terminated by the respondent in July 2018 and the termination was by a text message (SMS) and WhatsApp text. As at termination the respondent pleaded he was on annual leave. He pleaded that the termination violated sections 35, 41, 43, and 45 of the Employment Act, 2007. The respondent claimed for:

- a) One-month pay in lieu of notice Kshs. 16, 100.00.
- b) Unpaid salary for August 2018 Kshs. 16, 100.00.
- c) Compensation for unfair termination Kshs. 168, 000.00.
- d) House allowance arrears 15% of salary x108 months worked =15% x 14,000 x 108 = 2100 x 108 = Kshs. 226, 800.00.
- e) Overtime from 01.08.2009 to 01.07.2018 Kshs. 283, 512.96.
- f) Service pay Kshs. 15/30 x basic salary x No. of completed years worked = 15/30 x 14, 000 x 9 = Kshs. 63, 000.00.
- g) Total claimed Kshs. 773, 512.96.
- h) Certificate of service.

The respondent pleaded that the demand letter had issued but the respondent had failed to meet the claims.

The claimant prayed for judgment against the respondent for:

- a) Declaration that the claimant's services were unprocedurally, unlawfully, and unfairly terminated and in the circumstances the claimant is entitled to compensation of his terminal dues as claimed.
- b) Kshs. 773, 512.96.
- c) Certificate of service.
- d) Costs of the suit plus interest till full payment.

e) Any other further and better relief the Honourable Court may deem just and fit to grant.

The appellant filed the statement of response and counterclaim dated 27.12.2019 through Saeta & Company Advocates. The appellant clarified that the employer was properly Maawiya Ali Abdalla trading as South Coast Paints & Hardware duly registered as a business name. The appellant described the business premises as a room 450 square feet operating from 8.00am to 5.00pm with one-hour staff lunch break. Further it did not operate on Sundays and public holidays. The appellant stated the respondent's I.D number, KRA pin number, NSSF number, NHIF number, and personal cell phone No. +254724xxxx.

The appellant further pleaded that he employed the respondent as a shop helper reporting to one Ahmed Adulrahman, the sales representative. The respondent's duties were cleaning hardware shop; fetch items from store as instructed; loading of goods as instructed; and as instructed sorting and packing of customers' goods. Initial consolidated salary was Kshs. 11,000.00 per month inclusive 15% house allowance per section 31 of Employment Act and the Regulation of Wages (General) Order. The appellant pleaded that he complied with all provisions of the Employment Act, 2007 on minimum terms and conditions of service. It was denied that the appellant ever extended the respondent's roles to those of a driver in a related company and all along the delivery driver had been one Mohamed Athman Bwana – the appellant never owned a company known as Lela Books and Stationery. It was denied that the appellant terminated the employment by way of the WhatsApp and SMS text messages as was alleged. It was appellant's case that the respondent deserted duty. The date of the termination had not been disclosed. The appellant pleaded that the respondent was entitled to a truthful certificate of service per section 51 of the Act.

The appellant further pleaded that the respondent went for annual leave on 30.07.2018 and scheduled to resume duty on 20.08.2018 but he failed to do so. The appellant and the Kwale labour officer traced the claimant to resume duty but it was all unsuccessful and since 30.07.2018 the appellant had never heard of the respondent. On 09.11.2019 the appellant served the summons to enter appearance plus the statement of claim.

The appellant counter-claimed that on 20.05.2017 the respondent was advanced Kshs. 100, 000.00. The agreement was that the respondent repays in monthly instalments of Kshs. 5, 000.00. As at August 2018 when the respondent deserted duty he had repaid Kshs. 75, 000.00 and Kshs. 25, 000.00 was outstanding. In July 2018 the claimant was granted request to go on annual leave and to 20.08.2018 but he failed to report back at the end of the leave. He was called on his cell phone severally but the calls went unanswered. The appellant also called the respondent's father who was the stated next of kin but in vain. On 13.09.2018 the appellant notified the area labour officer in Kwale about the respondent's desertion of duty and the officer traced the respondent unsuccessfully so. Thus the respondent deliberately refused to resume duty on 20.08.2018 at the end of annual leave. The appellant counterclaimed and prayed for judgment against the respondent for:

- a) A declaration that the respondent deserted duty.
- b) Payment of Kshs. 25, 000.00 unpaid loan.
- c) Kshs. 14, 000.00 payment in lieu of one-month notice.
- d) Damages for desertion of duty.
- e) Exemplary damages.
- f) Costs of the suit.
- g) Interest on the foregoing reliefs.

The reply to response and response to counterclaim were filed on 17.08.2020.

Counsel for the parties filed submissions on the appeal and further made oral submissions. The Court has considered all the material on record and makes findings as follows.

The **1st issue** in this appeal is whether the appellant terminated the respondent's contract of service or the respondent deserted duty effective 20.08.2018 when he failed to resume duty at the end of his annual leave. In evidence in chief, the respondent testified that he was terminated by the appellant in August 2018 and he proceeded, **"His wife who was our manager phoned me when I was admitted in hospital at Mariakani Hospital on 28.07.2018 and told me that I had been terminated. I was not told the reason for termination; I had informed them that I was unwell. I was never served any warning letter. I was never called for any disciplinary proceedings. I was not given a hearing...."** In cross-examination, the respondent testified that he had not filed documents to show he had been admitted in hospital, he had not stated the cell phone number (presumably the one he asserted the appellant's wife had called him on), and he repeated he had been terminated through a phone call. The appellant's witness No. 1 (DW1) was Ahmed Abdulrahman Hamid. He testified that he was the respondent's supervisor and he had not been terminated by phone call thus, **".... He was not terminated on phone. He was to come back to work on 20.08.2018 but did not do so. I called him on his number 0724504933 but he never picked. I called for a week and they told my boss to call his father on 0728774131. It is the boss who called the father..."** The appellant's witness No.2 was Mohamed Athman Bwana testified that the respondent was not terminated and further that he was not there when claimant was terminated.

This being a first appeal, the Court has reminded itself of the obligation to re-evaluate the evidence on record and arrive at appropriate just conclusions bearing in mind that it did not see the witnesses or take the evidence by itself.

The Court has considered the judgment and finds that the learned trial magistrate erred in stating, **"On cross examination the claimant stated that he was terminated via text message even though he did not provide the telephone number...."** As already reproduced earlier

in this judgment, the respondent stated that he was terminated by a phone call – and nowhere in his testimony did he mention the text messages. The Court has perused the judgment and there is no point the trial Court related the respondent’s pleadings about the termination to the claimant’s testimony in that regard. The Claimant had pleaded at paragraph 7 and 8 of the memorandum of claim thus, “**7. The claimant avers that the Respondent wrongfully, unprocedurally and unlawfully terminated his employment via text message (SMS) and WhatsApp text. 8. The claimant avers that he was on his annual leave when the respondent unprocedurally unlawfully and/or unfairly terminate him.**” Now, in his testimony, the respondent introduced the issue of being in hospital and then being terminated by a phone call from the appellant’s wife. The Court holds that it is trite law that parties are bound by their pleadings and the trial court was bound to analyse the evidence against the pleadings. If that had been done it would be found that the respondent’s testimony on the circumstances of the separation was completely outside his pleaded case of being terminated by text messages by way of SMS and WhatsApp. The Court finds that on the other hand, the appellant’s evidence was consistent and coherent that the respondent took leave and never resumed duty on 20.08.2018 as was expected. To address the issue who between the parties is more likely to stating the truth, it should that the respondent’s testimony which is inconsistent with his pleadings must be disregarded and the appellant’s testimony which is consistent with the pleaded case be upheld. The Court finds that the trial Court misdirected itself in that regard by failing to consider the evidence against the parties’ respective pleaded cases on the circumstances of the separation. The Court finds that as submitted for the appellant, the respondent deserted duty and never returned to work at the end of his annual leave and, by his own pleading, he confirmed that he had been on leave. A close glance at the respondent’s pleading and evidence is avoidance of details on dates such as when the leave was ending and the dates of the alleged text messages by SMS and WhatsApp – and steps he may have taken. Such gaps and inconsistencies in pleadings and testimony render the respondent’s case not established on a balance of probability or at all. The Court upholds the appellant’s submission that **John Onteri Momanyi –Versus- Motor Boutique Limited [2018] eKLR** applies for the holding that the claimant’s contradictory evidence and case cannot be trusted and the respondent’s coherent and clear evidence and case in such circumstances prevails. The Court finds that while pleading dismissal by SMS or WhatsApp message and then by phone call, the respondent was empty on the particulars of the messages conveyed and thereby further making his account not believable at all.

Having found that the parties separated by reason of the desertion of the respondent, the issue of due process of a notice and a hearing under section 41 of the Employment Act, 2007 as well as the issue of validity of reason for termination under section 43 of the Act or even the fairness of the reason for termination under section 45 of the Act do not begin to arise in the instant case.

The Court therefore finds that the trial Court misdirected itself when it stated, “**The respondent herein has not been able to demonstrate that indeed the Claimant deserted duty and that the procedure in dealing with the same as stipulated by the Employment Act was exhausted. The Respondent had the duty to exhaust disciplinary measures against the Claimant which would perhaps have included warnings and probably a notice to show cause as to why he had not reported on duty on the expected date or dates. In as much as the Claimant has not adduced any evidence to confirm that he was indeed seeking treatment as alleged in his pleadings, dismissing him without giving him a chance to ventilate his defence or make an explanation was overly wrong and unlawful....**”

As earlier found, the respondent had not pleaded that he had been sick while on leave and that he was seeking treatment so that the trial Court’s analysis in that regard was flying outside the pleaded facts for determination and the trial Court was plainly misdirected that the appellant had to subject the respondent to a disciplinary process to establish whether the respondent had been unwell. The respondent had pleaded about termination by SMS and WhatsApp messages, he altogether abandoned that pleaded case in his testimony and introduced a brand new case of being sick and without exhibiting medical evidence. The brand new case in the testimony was clearly not the case before the trial Court – the pleaded case, in the words of Mr. Masore Advocates for the appellant being, “**Is a case that can be summarised into one question: unfair termination or desertion?**” The Court finds that the material on record shows that as pleaded, the claimant failed to establish the alleged termination by SMS and WhatsApp messages and instead, the respondent established that the claimant never returned to resume work after the end of annual leave – parties not being in dispute that indeed he took annual leave. The Court finds that after leave period ended, the respondent has not attempted to make an account of his whereabouts and within the misty incoherent case of he was dismissed by SMS, WhatsApp message or a phone call from the appellant’s wife and which the Court has found inconsistent, incoherent, against the binding nature of pleadings, and therefore not believable. Thus there is no reason to disregard the appellant’s case and account for voluntary desertion of duty by the respondent characterised with the respondent’s total disconnection to be out of the appellant’s reach - the material on record establishing unnatural employee behaviour on the part of the respondent that, if indeed he suffered adversity of the alleged termination, he is not seen pursuing the issue with the appellant and promptly so to try and recover his otherwise likable and crucial employment.

The **2nd** issue in the appeal is whether the trial Court erred in awarding the remedies as was done. The appellant challenges the award of Kshs. 14, 000.00 notice pay, the declaration the termination was unlawful, unprocedural and unfair and, award of 12 months’ salaries in compensation for the unfair termination Kshs.168, 000.00. By reason of the findings on issue 1 above, the two awards as challenged are amenable to being set aside. It is the respondent who deserted duty and he is not entitled to notice pay. Instead, the desertion amounted to resignation without notice and the respondent is awarded Kshs. 14,000.00 pay in lieu of notice per section 36 of the Act. The trial Court Awarded the counterclaim Kshs.25, 000.00 deductible as a part payment of the amount that had been awarded to the respondent. The Court finds that the same is now due without such set off as was contemplated in the trial Court’s judgment. The respondent should therefore pay the appellant a sum of **Kshs. 39, 000.00**. No submissions were made on the claims and prayers for damages for desertion of duty and exemplary damages and the same are deemed abandoned or unjustified.

The Court has considered that the respondent was entitled to the certificate of service and did admit the claim on loan as claimed. In that consideration, each party will bear own costs for the proceedings before the trial Court. As the appeal has succeeded, the respondent will pay the appellant’s costs of the appeal.

In conclusion the appeal is hereby determined with orders:

- 1) The trial Court’s judgment in favour of the respondent is hereby set aside but subject to order (2) below.
- 2) The appellant to deliver a certificate of service to the respondent within 21 days from the date of this judgment.
- 3) The respondent to pay the appellant **Kshs. 39, 000.00** by 01.07.2022 failing interest to run thereon at Court rates from the date of

this judgment till the date of full payment.

4) Each party to bear own costs of the suit in the trial Court.

5) The respondent to pay the appellant's costs of the Appeal.

Signed, dated and delivered by video-link and in court at Mombasa this Friday 25th February, 2022.

BYRAM ONGAYA

JUDGE