



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRC APPEAL NO. E009B OF 2021.

ANYTIME LIMITED.....APPELLANT

VERSUS

FREDRICK MUTOBERA OMURAYA.....RESPONDENT

(Being an Appeal against the Judgment and Decree of Hon. M. Agutu (SRM) in Kisumu

CMCC ELRC CAUSE No. 92 of 2020 delivered on 26th February, 2021)

JUDGMENT

1. This judgment arises from an Appeal lodged by the Appellant herein against the judgment of the Chief Magistrate's Employment and Labour Relations Court at Kisumu.

2. The Respondent filled a claim on 10th June, 2020, wherein, he sought an award for one month's salary in lieu of notice, salary for the remainder of his contract, 12 months' salary as damages for unlawful and unfair termination, exemplary damages, costs of the suit and interests thereon.

3. The court rendered judgment on 26th February, 2021, declaring the Respondent's termination unprocedural and granted all the prayers sought in the statement of claim.

4. The Appellant was dissatisfied with the judgment and decree of the court and hence this appeal.

5. The appeal is premised on the grounds THAT:

i. The Learned Trial Magistrate grossly misdirected herself in treating the evidence and submissions before her superficially and consequently coming to a wrong conclusion on the same;

ii. The Learned Trial Magistrate erred in law and in fact when she used her discretion wrongly in awarding excessive damages in the circumstances and failing to consider the fact that no evidence was led before her on the basis of which such an award could be found;

iii. The Learned Trial Magistrate erred in law and in fact in awarding the Respondents Kshs. 369,000.00 as claimed by the Respondent which award was so inordinately high, unmerited, unjustified, disproportionate, excessive and unreasonable.

iv. The Learned Trial Magistrate applied the wrong and inaccurate principles and/or considered erroneous, irrelevant and/or extraneous factors in determining the issue of unlawful termination of employment and she erred by failing to consider or by dismissing out of hand, the issues and/or submissions raised by the Appellant;

v. The Learned Trial Magistrate erred by awarding special damages which had not been strictly proved and were unjustified and unmerited, and her awards were unfair and indefensible and have resulted in a miscarriage of justice; and

vi. The Learned Trial Magistrate erred in law and fact in limiting her decision and consideration to argument of the existence of a probationary contract only and disregarding all other arguments and evidence submitted on behalf of the Appellant and thus making an unjustified decision.

6. The Appellant's prayer, is that the appeal herein be allowed and the Trial Magistrate's judgment on quantum be set aside and be substituted with an award that the court deems fit.

7. The Appellant filed submissions in the matter. The Respondent filed his submissions on 24th January, 2022, beyond the time allocated for submissions, hence were not considered.

The Appellant's Submissions

8. It is submitted that the Appellant was employed as a driver for a specified period (3 months) and on probationary terms. The Appellant further submitted that his contract was expressly headed '**Probationary Service Contract**' which provision in the opinion of the Appellant, would have given the Trial Court a general idea of what the Respondent and the Appellant intended the contract to be. The Appellant submits that the agreement of the parties herein was for the contract to run for three years but that the trial court ignored this fact and opted to deem the contract as a non- probationary one.

9. The Appellant submitted that for reason that the Respondent's contract was probationary, she adhered to the provisions of Section 42(4) of the Employment Act, 2007, having given the Respondent a seven-day notice of termination in accordance with this law. The Appellant sought to rely on holding in the case of **Danish Jalang'o & Another v Amicabre Travel Services Limited (2014) eKLR** where the court held that Section 42 of the Employment Act does not impose other obligations on the part of an employer, in terminating a probationary contract, other than giving of 7 days' notice, or payment of 7 days' wages in lieu of such notice.

10. The Appellant submitted that the Trial Court acted in error in finding the termination of the Respondent unlawful, on the ground that the Appellant applied the provisions of Section 42(1) of the Employment Act which expressly excluded persons holding probationary contracts from the provisions of Section 41. She sought to rely on the holding in the case of **Monica Munira Kibuchi & 6 Others v Mount Kenya University & Another (2021) eKLR**.

11. The Appellant invited this court to take cognizance of the fact that the Respondent was terminated in the early days of the Covid-19 Pandemic that ravaged and adversely affected businesses all over the world.

12. The Appellant submitted that the Respondent was not entitled to the remedies sought having been employed on probationary terms of service and the termination having been effected in accordance with the law. They placed reliance on the case of **Caroline Waithira Kariuki v Mercy Corps (2021) eKLR**.

13. The Appellant further submitted that per Section 36 of the Employment Act, the Respondent would, if the court found his termination unfair be entitled to the wages he would have earned had he been given the period of notice to which he was entitled to under the law. The Appellant proceeded to urge this court to find that the Respondent was only entitled to 7 days' pay in lieu of notice in addition to the salary for the month he worked, which salary had already been paid.

14. It was further submitted that the actions of the Appellant in terminating the services of the Respondent were not malicious to warrant the award of exemplary damages. The Appellant relied on the holding in the cases of **Godfrey Julius Ndumba Mbogori & Another v Nairobi City County (2018) eKLR** and **Rookes v Barnard (1964) AC 1129** to support this position.

15. The Appellant submitted that the trial court fell in error when she awarded the Respondent a 12 months' salary as damages for unlawful termination when his contract was for a fixed term of 3 months'. The Appellant further submitted that the trial court failed to take into account the fact that the termination had already been mitigated by the Respondent through securing an alternative employment.

16. It is finally submitted for the Appellant that as settled by the court in the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro (2017) eKLR**, the trial Magistrate failed to justify each relief granted by her.

Determination

17. My role in this appeal, which is a first appeal, is to re-assess and re-evaluate the entire evidence tendered before the trial court and arrive at my own conclusions, while taking into consideration the lower court's exercise of discretion on findings of fact and law. (**See Musera vs. Mwechelesi & Another ([2007]) eKLR**)

18. Arising from the grounds of appeal and the judgment of the Trial Court, the following are the issues for determination:

- i. Whether the contract of service between the Appellant and the Respondent was probationary and whether the same was lawfully and fairly terminated.
- ii. Whether the Respondent was entitled to the reliefs granted by the Trial Court

Whether the contract of service between the Appellant and the Respondent was probationary and whether the same was lawfully and fairly terminated.

19. The evidence before the trial court is that the Respondent was employed for a 3 months' fixed term contract. The Appellant's case is that the nature of this contract was probationary and by dint of Section 36 of the Employment Act, 2007, the requisite notice period in the event either party wanted to terminate the contract was 7 days.

20. The position of the trial court is that the contract between the parties herein, was non-probationary, while the Appellant aver that the said contract is probationary and emphasized that the contract in question was headed **“Probationary Contract of Service”**. This creates the need for this court to address what constitutes a probationary contract of service.

21. The Employment Act defines probation contract as **“a contract of employment, which is of not more than twelve months duration or part thereof, is in writing and expressly states that it is for a probationary period”**

22. The Black’s Law Dictionary 11th Edition, defines Probationary Period of Employment as: **“serving for a test or trial”** and a Probationary employee as **“a recently hired employee whose ability and performance are being evaluated during a trial period of employment”**

23. Going by the above definitions, probation is a period where an employee is expected to work under supervision for a specified period, following which, he will be confirmed to the position.

24. Probation therefor, in the opinion of this court, is not a form of contract in its self. It is one of the terms and condition of a contract. Having said that, would the three months period accorded the Respondent in his contract then amount to a probation period? My take would be that though the Respondent’s contract was headed **“Probation Contract of Service”** and then going on to specify the term of the contract to be three months’, the parties in my opinion were in a fixed term contract and which should have proceeded to provide the period within the three months that the Respondent would serve on probation as a pre-chaser to the intended renewal. The entire contract period cannot in my view be probationary.

25. I find and hold that the contract between the Respondent and the Appellant was a fixed term contract.

26. On the question of whether the Respondent’s contract was lawfully and fairly terminated, the question of fairness is twofold; procedure and substantive justification.

27. The Appellant admitted not having issued the Appellant with the requisite notice and no mention of a show cause or any sort of disciplinary action taken against the Respondent. Instead, the Appellant attributed their decision to terminate the services of the Respondent to the Covid-19 pandemic. This in my view was an issue of redundancy.

28. The procedure that an employer is required to adopt in the event of the need to declare redundancy is well laid out under Section 40 of the Employment Act, 2007. No evidence has been adduced to the effect that the redundancy procedures were even contemplated.

29. That the Covid-19 pandemic had started ravaging businesses at the time of the Respondent’s termination, is not in doubt. This would have been a valid and justified reason to declare redundancy. No reasons were however given to the Respondent for his termination and none of the clear and easy to follow procedural tenets of redundancy were adhered to.

30. In this respect I uphold the finding of the trial court and hold that the Respondent’s termination was neither procedural nor substantively justified, hence the termination was unlawful and unfair.

Whether the Respondent was entitled to the reliefs granted by the Trial Court

31. Having upheld the decision of the trial court in finding that the Respondent was unlawfully and unfairly terminated, it then follows that there being no wrong without a remedy, the Respondent is entitled to relief. The issue then becomes whether the awards by the Trial court were reasonable in the circumstances of the case.

32. The holding of the Trial Court in regard to the remedies sought read as follows:

“The termination of the plaintiff was therefore unprocedural and unlawful.

In view of the above, I will grant the prayers as sought in the plaint.”

33. The Appellant’s case is that the trial Magistrate failed to justify the reliefs she granted. The Appellant cited the case of ***OI Pejeta Ranching Limited v David Wanjau Muhoro (2017) eKLR***, to support this position.

34. Prayers in a statement of claim are a Claimant’s wish list. The Court must interrogate each prayer and evaluate the same *vis-à-vis* the law and the facts of the case before it. The fact that an employer is found to be at fault, either in regard to the procedures followed or the justification of the termination, does not in itself entitle a claimant to all the reliefs sought in their statement of claim. Courts are obligated to give reasons for the awards they make.

35. The Trial Court awarded the Respondent one month’s salary in lieu of notice, two months’ salary for the remainder of his contract period, damages for unlawful and unfair termination, damages for loss of employment, exemplary damages, costs of the suit and interests thereon.

One Month Salary in Lieu of Notice

36. This court has found that the Respondent’s contract of service was a fixed term contract, and hence self-executing. The Appellant was under no obligation to issue notice. The award of one month’s salary in lieu of notice awarded by the Trial Court is set aside.

Damages for unlawful and unfair termination and Salary for the Remainder of the Contract

37. Compensation for unfair termination/dismissal is provided for under Section 49 of the Employment Act, 2007. The Courts in awarding compensation must consider the 13 grounds set out therein, to justify their award of damages in this respect.

38. The trial Court awarded the Respondent 12 months' salary as compensation/damages for unlawful and unfair termination. The Respondent's contract was fixed term for 3 months. The 12 months' award is unreasonable, unjustified and disproportionate in the circumstances of this case, as the Respondent did not have legitimate expectation to serve for more than the three (3) months' given under his contract of service. (*See Ol Pejeta Ranching Limited v David Wanjau Muhoro (2017) eKLR supra*).

39. The award of 12 months' salary in damages for unlawful and unfair termination is hereby set aside and substituted thereto with three months' salary as compensation for unlawful and unfair termination.

40. The trial court awarded the Respondent two months' salary for his unexpired term of contract. Having awarded compensation for the unfair termination, an award for the unexpired term would amount to unjust enrichment on the part of the Respondent.

41. Guided by the holding in the case of **Elizabeth Wakanyi Kibe v Telkom Kenya Ltd [2014] eKLR** where the Court cited the case of **D.K. Marete v Teachers Service Commission Cause No. 379 of 2009**, and held that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees, but are meant to redress economic injuries in a proportionate way, I set aside the award of two months' salary for the remainder of the contract in its totality.

Damages for Loss of Employment

42. The trial court awarded the Respondent 12 months' salary for loss of employment at KShs. 144,000. No justification whatsoever was put forward for this award. Having made an awarded damage for unfair and unlawful termination, I find this award to be without merit and is hereby set aside in its entirety.

Exemplary Damages

43. The Trial Court made an award for exemplary damages. No quantum was however assigned to it. Nonetheless, I continue to address the issue of whether or not this award was justified.

44. Exemplary damages are awarded to purge malicious and outrageous conduct by an employer that caused suffering to an employee. (**See Cause 953 of 2011, Patrick Njuguna Kariuki v Del Monte Kenya Limited**). The circumstances of this case do not satisfy the grounds established by **Lord Devlin** in the case of **Rookes v Barnard (1964) AC 1129** to merit the award of exemplary damages.

45. The award of exemplary damages is set aside.

46. In sum, the judgment of the Trial Court is set aside and the appeal allowed in the following terms:

- i. The award of one month's salary in lieu of notice is set aside
- ii. The award of salary for the remainder of the contract is set aside in its totality
- iii. The award of damages for loss of employment is set aside in its totality
- iv. The award of 12 months' salary in compensation for unfair termination is set aside, and replaced with a 3 months' salary in compensation for unfair termination at KShs. 45,000/-
- v. The award of exemplary damages is set aside.
- vi. The award of costs and interests in the Cause before the trial court is upheld, save that the same should be based on the awards in the appeal.
- vii. This Appeal having substantially succeeded and the Respondent not having participated in the appeal, I order that each party bears their own costs of the Appeal.

47. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 10TH DAY OF FEBRUARY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Achieng for the Appellant

Ms. Lukasile h/b for Mr. Anyumba for the Respondent

MS. Christine Omollo - Court Assistant.