



**Shivling Supermarket Ltd v Ochola (Appeal E009 of 2021)  
[2022] KEELRC 14682 (KLR) (23 March 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14682 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E009 OF 2021  
S RADIDO, J  
MARCH 23, 2022**

**BETWEEN**

**SHIVLING SUPERMARKET LTD ..... APPELLANT**

**AND**

**SINGA DUNCAN OCHOLA ..... RESPONDENT**

**JUDGMENT**

1. In a judgment delivered on 21 February 2020, the Trial Court entered judgment for Singa Duncan Ochola (the Respondent) and awarded him pay in lieu of notice, compensation, service pay and accrued leave.
2. Shivling Supermarket Ltd (the Appellant) was dissatisfied, and it filed a Memorandum of Appeal with the Court on 26 March 2021 contending that:
  1. The learned trial Magistrate erred by finding that the Claimant had proved his claim on a balance of probabilities.
  2. The Learned trial Magistrate erred by failing to take into account relevant principles in the award of damages.
  3. The Learned trial Magistrate's award of damages was manifestly excessive and punitive in the circumstances.
3. On 14 December 2021, the Court directed the parties to file and exchange submissions.
4. The Appellant filed its submissions on 15 March 2022 (should have been filed and served before 14 January 2022), while the Respondent filed his submissions on 9 March 2022 (should have been filed and served before 14 February 2022).
5. The Court has considered the Record of Appeal and submissions.



## Role of Court on the First Appeal

6. The Court of Appeal pronounced itself on the role of a first appellate Court in *Kenya Ports Authority v Kuston (Kenya) Limited* (2009) 2 EA 212 thus:

"On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the Court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

7. The Court will keep the interdict in mind.

## Burden/Standard of Proof

8. By dint of section 47(5) of the *Employment Act, 2007*, the employee should prove at the first instance that an unfair termination of employment occurred before the employer is called upon to justify the termination of employment.
9. In the witness statement, which was adopted as part of the evidence, the Respondent stated that he was informed of the termination of his employment through a phone call.
10. The Respondent stated that he was not given a letter terminating his employment during cross-examination.
11. Section 35(1)(c) of the *Employment Act, 2007* contemplates the employer giving written notice of termination of employment.
12. The Appellant did not call any witness or lead evidence.
13. With the evidence of the Respondent that he was dismissed through a phone call remaining unrebutted and unchallenged, the Court finds that the trial court did not fall into any error as far as the burden and standard of proof was concerned.

## Compensation

14. The trial Court awarded the Respondent the equivalent of 10-months' gross wages as compensation, but he did not give any reasons for the award.
15. Section 49(4) of the *Employment Act, 2007* has set out the factors a Court should consider in awarding compensation and by failing to set out which of the elements it considered, the Trial Court fell into error of law.
16. The Respondent served the Appellant from 2003 to 2020, a period of about 17 years, and considering the length of service, the Court will not disturb the award of compensation. The award was not excessive or punitive. Service pay
17. The trial Court awarded the Respondent Kshs 360,000/- as service pay.
18. The Respondent produced evidence to show that he was contributing to the National Social Security Fund. Under section 35(5) and (6) of the *Employment Act, 2007*, he was not eligible for an award of service pay.
19. By awarding service pay, the Court fell into an error of both law and fact, and the award is for setting aside.



## **Conclusion and Orders**

20. From the foregoing, the Court orders:
  - a. The award of Kshs 360,000/- service pay is set aside.
  - b. The appeal against compensation and salary in lieu of notice and accrued leave are dismissed.
21. The Respondent will have costs of the Appeal and costs and interest on the decretal sum awarded by the trial Court.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 23<sup>RD</sup> DAY OF MARCH 2022.**

Appearances

Radido Stephen, MCIArb Judge

For Appellant Nyamurongi & Co.

For Respondent Advocates H. Obach & Co.

Court Assistant Advocates Chrispo Aura

