



**Otieno v Mega Garments Industires [EPZ] Ltd (Appeal E068 of 2021)
[2022] KEELRC 1144 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1144 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E068 OF 2021**

**AK NZEI, J
MAY 5, 2022**

BETWEEN

EVERLYNE ADHIAMBO OTIENO APPELLANT

AND

MEGA GARMENTS INDUSTIRES [EPZ] LTD RESPONDENT

(Appeal from the Judgment of the Hon. C.N. Ndegwa, Principal Magistrate delivered on 20th August 2021 in Mombasa Chief Magistrate's Court Cause No. 54 of 2018)

JUDGMENT

1. The appeal before me is against the Lower Court's judgment delivered on August 26, 2021 in Mombasa Chief Magistrate's Court ELR Case No. 54 of 2018, wherein the Appellant herein had sued the Respondent.
2. The Appellant had on July 24, 2018 filed a Memorandum of Claim dated July 23, 2018 and pleaded:-
 - a) that she was employed by the Respondent as a quality checker from November 2012 to May 16, 2018 when her services were terminated.
 - b) that the Claimant's monthly salary was Ksh 17,000.
 - c) that on May 16, 2018 while at work, the machines were producing clothes that were not of good quality and that this stalled the work process; a situation which the Appellant explained to her supervisor who then ordered the Claimant to go to the Human Resource Office.
 - d) that at the Human Resource Office, the Appellant met the Human Resource Manager and the Production Manager, who closed themselves in an office for a talk and when they came out, they ordered the Appellant to go home and would be called back to work.
 - e) that the Appellant was never called back.



- f) that the Appellant was never allowed to proceed on leave during the years of employment.
 - g) that termination of the Appellant's employment was unfair, unlawful and without justification.
 - h) that the Claimant was not issued with a termination notice, neither was she paid in lieu thereof.
3. The Appellant sought the following reliefs in the Lower Court:-
- a) Declaration that her termination by the Respondent was unfair.
 - b) One month salary in lieu of noticeKsh 17,000
 - c) leave pay for five years worked (21/30x17000x5 years).....Ksh 59,500
 - d) unexpounded contract from May 16, 2018 to 2nd July 2018 (2 months)Ksh 34,000
 - e) 12 months salary compensation for unlawful termination.....Ksh 204,000
 - f) Certificate of Service.
 - g) Costs of the claim.
4. The Appellant filed in the Lower Court her recorded witness statement dated July 23, 2018, which basically restated the averments made in the Memorandum of Claim, and a list of documents dated the same date, listing some seven documents which included:
- a) copies of the Appellant's (national identity card and job identity card).
 - b) the Appellant's employment contract dated 3/1/2018.
 - c) the Appellant's payslip for the periods February 17, 2018 to March 19, 2018 and March 20, 2018 to April 18, 2018.
 - d) the Appellant's NSSF statement.
 - e) Demand letter dated June 18, 2018.
 - f) the Respondent's letter dated July 3, 2018 (responding to the demand letter).
5. The Respondent entered appearance on August 29, 2018 and filed Response to the statement of claim on September 18, 2018, and pleaded; inter alia:-
- a) that the Appellant had, vide a letter of contract dated January 3, 2018, been employed as a general labourer and assigned as an endline checker.
 - b) that the employment contract ran from January 3, 2018 to July 2, 2018.
 - c) that the Respondent company was faced with delay in fabric delivery and asked employees to take leave and to report to work on 28th and June 29, 2018.
 - d) that the Appellant was on leave as per her leave application as from May 18, 2018 to June 17, 2018.
 - e) that the Appellant and other 136 workers were paid 7 days allowance for disruption of their contract periods dubbed "Notice Pay" and that the payment was made together with their May 2019 salaries.



- f) that on the appointed date, 28th and June 29, 2018, the Claimant did not report back to work and her supervisor, Abigail, called her on 0704-xxxxxx to find out why she hadn't reported to work, to which the Appellant claimed that she was held up upcountry and would take time to resume.
 - g) that the Claimant's services were not terminated, and her continued absence from work was tantamount to absconding work without reasonable cause.
 - h) that the Appellant was in breach of her obligations under the employment contract.
 - i) that all leave days had been taken by the Appellant and those not taken had been paid in lieu thereof.
6. The Respondent filed in the Lower Court a witness statement by one Duncan Kavita (dated 01/3/2019), basically restating the averments made in the Respondent's response to the claim. The Respondent also filed a list of documents dated November 6, 2018, listing the following documents:-
- a) leave application Form for May 18, 2018 to June 17, 2018.
 - b) salary Slip for the period April 19, 2018 to May 18, 2018.
 - c) salary Slip for the period November 18, 2017 to December 18, 2017.
 - d) contract dated January 3, 2018 for the period 3rd January 2018 to July 2, 2018.
7. When hearing commenced before the Lower Court via Microsoft Teams on December 1, 2021, the Appellant adopted her filed witness statement as her testimony and produced the documents listed on her list of documents as exhibits. The Appellant further testified:
- a) that she did not apply for leave from May 18, 2018 to June 17, 2018.
 - b) that her Supervisor was Bernard, and not Abigail.
 - c) that she did not receive any payslip or payment after termination, and that she did not receive any warning letter or show cause letter.
 - d) that when she went back to the Respondent's premises after a month, she was not allowed inside.
8. Cross examined, the Appellant testified that she was terminated on seven days' notice under the contract on compensation for seven days payment. Apart from the notice issue, the rest of the Appellant's evidence was not shaken under cross examination.
9. The Respondent's witness, Duncan Kavita (RW-1), adopted his filed witness statement as his testimony and produced the documents listed on the Respondent's list of documents as exhibits. RW-1 further testified:-
- a) that the Respondent never terminated the Appellant's services.
 - b) that there was unexpected shortage of fabric/raw material and all employee's leave was paid.
10. Cross-examined, RW-1 testified that the Appellant was on leave between May 18, 2018 and June 17, 2018, and that this was part of normal and unpaid leave also.
- a) that the Claimant's leave days were offset against the days that she had been away.



- b) that the Appellant deserted work, but the Respondent did not issue a notice to show cause, and did not invite the Appellant for a disciplinary hearing.
11. The Lower Court delivered its judgment and rendered itself as follows:-
- “...under Clause 10 of the contract of employment, either party could terminate the employment by giving 7 days’ notice or payment in lieu of notice.
- The question the Court is to ask is whether the termination of the employment of the Claimant was lawful in light of the fact that the terms of contract allowed the Respondent to terminate the employment by giving 7 days work in lieu of notice. In my view, there is nothing unlawful in the termination because it was done in accordance with the express terms of the contract of employment. No compensation can accrue from that. The prayer for one month notice, the unexpired contract and compensation for unlawful termination must fail. As regards the claim for leave for 5 years, there is evidence that the Claimant was paid some money for leave in the year 2017 and in the year 2018.
- It cannot therefore be true that she was not paid her leave dues for 5 years. The other years apart from 2017 and 2018 were not particularized and in view of the fact that she had taken leave between 18th May and June 17, 2018, it is my finding that she is not entitled to compensation because under the contract of employment, she was entitled to 2 days leave for every month served.
- The Claimant is of course entitled to get a certificate of service from the Respondent which I direct the Respondent to supply to the Claimant’s advocates within 30 days of the date hereof but in view of my finding on the rest of the claim, I direct that the Claimant shall meet the costs of defending the rest of the claim based on the dismissed claim of Ksh 314,500. Orders accordingly. Right of Appeal 30 days.”
12. Aggrieved by the said judgment, the Appellant preferred an appeal to this Court vide a Memorandum of Appeal dated 27th September 2021 outlining the following grounds of appeal:-
- a) the Learned Magistrate erred in law and fact in finding that it was correct for the Respondent to terminate the Claimant by giving a 7 days’ notice or payment of 7 days in lieu thereof.
- b) the Learned Magistrate erred in law and fact by finding that the Claimant was not terminated unfairly.
- c) the Learned Magistrate misdirected himself by failing to fully appreciate and correctly analyze the pleadings and evidence before him.
- d) the Learned Magistrate erred in law and fact by dismissing all the Claimant’s claim prayed in the Memorandum of Claim.
- e) the Learned Magistrate erred in law and in fact by directing that the Claimant pays costs of the suit.
13. The foregoing is the appeal before me and I will address all the grounds of appeal together. This being a first appeal, this Court is obligated to consider the pleadings filed in the Lower Court and to evaluate the evidence presented by the parties and to make its own decision thereon.
14. It is clear from the pleadings filed and evidence presented in the Lower Court by both parties that whereas the Appellant pleaded and testified that her employment was unfairly terminated by the Respondent on May 16, 2018, the Respondent on the other hand pleaded and testified that it did not



- terminate the Appellant's employment. The Respondent maintained that the Appellant absconded duty.
15. In my view, issues that present themselves for determination are as follows:-
- a) whether the Appellant's employment was terminated by the Respondent, and if so, whether such termination was unfair.
 - b) whether reliefs sought by the Appellant in the Lower Court were deserved.
 - c) who should pay costs of this appeal and of the proceedings in the Court below.
16. On the first issue, the Appellant pleaded and testified that she was, on May 16, 2018, told by the Respondent's Human Resource Manager and the Production Manager to go home and would be called back to work, but was never called back. This position was never rebutted by the Respondent's witness (RW-1), the Respondent's Human Resource Manager. Instead, the Respondent set out to demonstrate that the Appellant took leave on May 18, 2018 to June 17, 2018 but failed to report back to work. In the same breath the Respondent pleaded and alleged that it experienced an unexpected shortage of fabrics/raw material and that all their employees were asked to take leave and report back to work on 28th and June 29, 2018, and that the Appellant did not report back to work. The Respondent did not however, tell the trial Court when it experienced the raw material shortage, and when its employees were asked to take leave and report back on 28th and June 29, 2018. Further, no letter, internal memo or notice asking the Respondent's employees to take leave was exhibited in Court.
17. I have examined the leave application form said to have been filled by the Appellant seeking to take leave from May 18, 2018 to 17th June 2018, and have noted the following:-
- a) the document does not specify the type of leave sought to be taken. Whether annual leave, compassionate leave, maternity leave or study leave. The part that ought to have been ticked in specification of the type of leave sought to be taken was left blank.
 - b) the part of the leave application form that ought to have been filled by the Respondent (Marked official use only) was left blank.
 - c) although the leave application form is shown to require two signatories in approval, the Respondent's HR and General Manager, only the HR's signature is appended. The General Manager's signature is missing.
 - d) there is no indication whether the leave sought was paid leave or unpaid leave. The part of the leave application form requiring such indication was left blank.
 - e) It is not shown whether the leave sought was approved.
18. The Appellant testified before the trial Court that she did not apply for leave from May 18, 2018 to June 17, 2018. The Respondent did not address that issue, either in its evidence or by way of cross examination of the Appellant. The Respondent did not demonstrate that the Appellant was at her place of work at any given time after the pleaded date of her termination, May 16, 2018.
19. If it was true that the Appellant absconded duty as alleged by the Respondent, which act amounts to gross misconduct attracting summary dismissal under Section 44 of the *Employment Act*, the Respondent would have been expected to invoke the provisions of Section 41 of the *Employment Act* 2007 and proceeded to terminate the Appellant's employment. It is not enough for the Respondent to allege that the Appellant's supervisor telephoned the Appellant. The supervisor was not even called to



testify in Court. Further, the Respondent did not explain how the Appellant, who was on a 6 months contract and only qualified for 2 days leave for each month served, would take thirty days leave.

20. I reject the Respondent's evidence that the Appellant absconded duty, and find, on a balance of probability, that the Respondent terminated the Appellant's employment as pleaded by the Appellant.
21. It is my finding that termination of the Appellant's employment by the Respondent was unfair as the Respondent did not comply with the mandatory procedural requirements of Section 41 of the *Employment Act* 2007. The Court of Appeal held as follows in the case of *Janet Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR,

“Section 45 of the Act makes provision, inter alia, that no employer shall terminate an employee unfairly. In terms of the said section, a termination of employment is deemed to be unfair if the employer fails to prove that the reason for the termination was valid, that the reason for the termination was a fair reason and that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer acted in accordance with justice and equity. The parameters of determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to terminate the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also not to be overlooked is the conduct and capability of the employee upto the date of termination, the extent to which the employer has complied with Section 41. Section 41 enjoins the employer, in mandatory terms, before terminating the employment of an employee on grounds of misconduct, poor performance or physical incapacity, to explain to the employee in a language that the employee understands, the reasons for which the employer is considering to terminate the employee's employment with them. The employer is also enjoined to ensure that the employee receives the said reasons in the presence of a fellow employee or a shop floor union representative of own choice, and to hear and consider any representation which the employee may advance in response to the allegations levelled against him by the employer.”

22. The Court of Appeal adopted this position in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR as the correct position in law that an employer ought to invoke when contemplating termination of an employee's employment.
23. I find, hold and declare that termination of the Appellant's employment by the Respondent was unfair.
24. On the second issue, and having found that termination of the Claimants employment by the Respondent was unfair, and taking into account the circumstances and the manner in which the Appellant's employment was terminated, I award the Appellant ten months' salary being compensation for unfair termination of employment.
25. On the prayer for one month salary in lieu of notice, the Appellant's contract of employment provided as follows:-

“upon successful completion of the probation period, either party can terminate this employment contract by serving the other with 7 days' notice in writing or otherwise by payment in lieu of notice.”



26. The Respondent did demonstrate vide the Appellant's payslip for the period April 19, 2018 to May 18, 2018 that Ksh 3,480 being notice pay was made to the Appellant. The Appellant did not deny this payment. The claim for notice pay is declined.
27. The prayer for leave pay for five years worked is declined. The Respondent exhibited the Appellant's payslips for the period November 18, 2017 and April 19, 2018 showing payment of leave payments. The Appellant did not refer to these payments in her pleadings, and did not particularize the outstanding leave payments, if any.
28. The claim for unexpounded contract from May 16, 2018 to 2nd July 2018 is declined as this kind of relief is not available under Section 49 of the Employment Act 207.
29. As rightly found and held by the trial Court, the Appellant is entitled to a Certificate of Service, but the same should be issued to the Appellant pursuant to Section 51(1) of the Employment Act, but not to her Advocates.
30. The appeal herein partly succeeds. On the third issue, costs will always follow the event unless the Court otherwise directs, as costs are in the Court's discretion.
31. Finally, I set aside the Lower Court's judgment dated 26th August 2021 and substitute it with judgment in favour of the Appellant against the Respondent for:-
 - a) Ten months salary being compensation for unfair termination (Ksh 17,000x10)
.....Ksh 170,000
 - b) Costs of this appeal and of proceedings in the Court below.
32. The Respondent shall issue the Appellant with a Certificate of Service under Section 51(1) of the Employment Act 2007 within thirty days of this judgment, if it has not done so.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 5TH DAY OF MAY 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

N/A for Appellant

Miss Onyango for Respondent

