Salpro Limited v Nyamwaro & 2 others (Employment and Labour Relations Appeal E041 of 2021) [2022] KEELRC 1251 (KLR) (14 July 2022) (Judgment)

Neutral citation: [2022] KEELRC 1251 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

EMPLOYMENT AND LABOUR RELATIONS APPEAL E041 OF 2021

CN BAARI, J

JULY 14, 2022

BETWEEN

SALPRO LIMITED .... APPELLANT

AND

JASPER OYUGI NYAMWARO .... 1ST RESPONDENT

LAURINE AKINYI ANGIENDA .... 2ND RESPONDENT

WILLIAM OLAL .... 3RD RESPONDENT

(Being an Appeal from the Judgment and Decree of the Senior Principal Magistrate at Kisumu (Hon. R. K. Ondieki SPM) delivered on the 23rd September, 2021 in Kisumu ELRC Cause No. 110, 111 and 112 of 2020 (Consolidated)

JUDGMENT

1. The Appellant lodged this appeal against the Respondents seeking orders that the appeal be allowed, and Judgment/decree of the Trial Magistrate in Kisumu Cm ElrcNos. 110, 111 and 112 of 2020, be quashed and set aside in its entirety.

2. The Trial Court consolidated the three claims and delivered judgment in favour of the Claimants, now Respondents, in the following terms:

> "Having found the termination of the Claimants unfair for want of valid reasons and fair procedure, they are entitled to the prayers sought and I enter Judgment for each Claimant against the Respondent in terms of the prayers sought in their respective Memorandum of Claim."

3. The Respondents under their separate Memoranda sought relief for underpayment, compensation for unfair termination, one month's pay in lieu of notice, service pay and certificates of service.

4. The Appellant was dissatisfied with the decision of the court and filed a Memorandum of Appeal dated 18th October, 2021, and filed 22nd October, 2021, premised on the following grounds:

    i. The Learned Magistrate erred in Law and fact in finding and holding that the Respondents had proved their claims on balance of probabilities when indeed the Appellant had produced letters dated 7th March, 2020, 6th March, 2020, and 11th March, 2020, indicating that the Respondents had been paid all their dues and they had no further claims against the Appellant.

    ii. The Learned Magistrate erred in Law and fact in relying on the Respondent's oral evidence which was inconsistent and unproved or at all.

    iii. The Learned Magistrate erred in Law and fact in awarding the Respondents twelve (12) months' pay without establishing a sound judicial principle to warrant the same.

    iv. The Learned Magistrate erred in Law and fact in his application and interpretation of Sections 26, 41 and 45 of the *Employment* and Act hence occasioning miscarriage of justice.

    v. The Learned Magistrate erred in Law and fact in failing to appreciate and/or disregarding the oral evidence produced by the Appellant's Operation Manager and therefore believing the Respondent's evidence which was contradictory and misleading in nature.

    vi. The Learned Magistrate Judgment/Decree was biased in favour of the Respondents against the Appellant, is full of errors, against the weight of evidence and a travesty of justice.

The Appellant's Submissions

5. It is submitted for the Appellant that the 1st Respondent's allegation that he worked for the Appellant as a Salesman for a period of five (5) years earning a monthly salary of Kshs.12,000.00 are untrue. The Appellant further submits that the averment was controverted by the Appellant where one Joash Okonjo testified that the 1st Respondent only worked for 2 years and 2 months at a monthly salary of Kshs.15,609.00 before absconding duties.

6. The Appellant submits that the 2nd Respondent worked for her in the position of general worker earning a monthly salary of Kshs.15,609.00 for a period of fourteen (14) months while the 3rd Respondent worked as a driver earning a monthly salary of Kshs.23,500.00 for a period of eleven (11) months.

7. It is submitted for the Appellant that the Respondents have not produced any documents/record to prove that there was an employment contract between themselves and the Appellant. The Appellant further submits that there was no documentary evidence that the Respondents were paid Kshs.12,000.00, Kshs.5,000.00 and Kshs.12,000.00 per month.

8. It is the Appellants' submission that the Subordinate Court erred in law and fact in believing the Respondents evidence on the salaries they received without evidence to support the allegations. The Appellant further submits that the lower court believed and allowed the computations as they were in the claims without ascertaining the correct period of time served. It is her submission that this action was wrong.

9. The Appellant submits that per her witness' testimony during trial and the letters of final settlement dated 7th March, 2020, 6th March, 2020, and 11th March, 2020, respectively, the Respondents received all their dues and had no other claims against the employer. It is the Appellant's further submission that the Respondents signed and thumb printed the settlement letters.

10. The Appellant submits that the Respondents bears the evidentiary burden this being a civil suit, under Section 107 of the *Evidence act* (Cap 80) Laws of Kenya states that. The Appellant placed reliance in the case of *Kenya Power & Lighting Company Limited V Pamela Awino Ogunyo* (2015)eKLR where the Court held as follows:-

> " A party who asserts or alleges that certain facts exist has a legal burden to prove those claims – Sections 107 – 109 of the *Evidence Act* which place a legal burden of proof or what may be called evidential burden of proof on the party making the assertion."

11. The Appellant submits that the Respondents absconded duty and hence their summary dismissal from employment. The Appellant submits that absence from duty is an act of gross misconduct which warrants summary dismissal in accordance with Section 44(4)(1) of the *Employment Act*.

12. The Appellant submits that the trial court failed to find that the Respondents willingly absconded their respective duties and the Appellant had no option but to summarily dismiss them.

13. The Appellant submits that 3rd Respondent served as a driver for a period of eleven (11) months, and is barred under Section 45(3) of the *Employment Act* from instituting the claim in the trial court. The Appellant further submitted that the trial court did not address this issue and hence it erred in allowing such a claim that had not materialized.

14. The Appellant further submits that the award of twelve (12) months' salary in compensation is excessive comparing the period of time that the Respondents had worked for the Appellant and further having been summarily dismissed for willingly absconding duties.

15. The Appellant submits that the Respondents are entitled to one (1) months' salary in lieu of notice, and would be the only valid award by the Trial Court. The Appellant sought to rely in the case of *D K Njagi Marete v Teachers Service Commission* (2020) eKLR for the holding that The Court has to be careful to ensure that the purpose of the compensation is to make good the employees' loss and not to punish the employer.

16. The Appellant submits that the Respondents did not prove the exact salaries and the period they worked for the Appellant and the figures in their claims have no basis. It is her further submission that it was the Respondents' duty per the *Evidence Act* to tender proof their allegation and not the Appellant.

The Respondent's Submissions

17. It is submitted for the respondents that their termination was verbal and without notice or pay in lieu of notice.

18. The Respondents submit that the law places a burden on the employer on employee records and not on the employee.

19. The Respondents submit that the award of under payment granted them by the Trial court is in accordance with the period they were in the service of the Appellant. They submit that the failure by the Appellant's witness, who is also their Human Resources Manager to produce evidence of how long they served, should not be visited on them as Section 74 of the *Employment Act*, obligates the employer to keep the employees' records.

20. The Respondents submit that although the *Employment Act* at Section 20 requires that the employer issues employees with pay slips, the Appellant did not meet this statutory requirement, and hence the reason the engagement between them and the Appellant is not documented.

21. It is the Respondents' submission that the Trial court was in order to award the under payment as prayed in their claims as they were under paid, and the Wages Order indicates what they should have earned in the period they were in the service of the Appellant. They sought to rely on the holding in Nyeri ELRC No. 17 of 2017-*Irungu Githae v Mutheka Farmers Cooperative Society* to support this position.

22. It is the Respondents' submission that the Appellant did not adhere to the law when terminating their employment. They submit that even in cases of summary dismissal, they still were entitled to fair procedure. The Respondents further submit that for reason that their termination was verbal, makes the dismissal unfair.

23. It is the Respondents' submission that in making an award of compensation, the Trial Court exercised its discretion, and which was within its right so to do. They submitted that nothing makes their award of 12 months' salary for unfair termination unlawful, the court having found their termination unfair.

24. The Respondents' submit that the Trial Court exercised it discretion judiciously in granting them the relieves it did.

25. The Respondents submit that they are entitled to payment of service pay for reason that the Appellant did not make any statutory deductions on their behalf as it should have. They had reliance in the holding in Nairobi Elrc Cause No. 725 Of 2016- *Martin Ireri Ndwiga V Olerai Management Limited* to buttress this position.

26. It is submitted for the Respondents that the payments the Appellant purported to have paid them is in relation to overtime and leave, which do not form part of their claim.

27. The Respondents pray that the appeal is dismissed with costs.

Analysis and Determination

28. The appeal herein is premised on six grounds, but which I summarize as follows:

    i. The Learned Magistrate erred in Law and fact in finding and holding that the Respondents had proved their claims on balance of probability.

    ii. The Learned Magistrate erred in Law and fact in his application and interpretation of Sections 26, 41 and 45 of the *Employment* and Act hence occasioning a miscarriage of justice.

    iii. The Learned Magistrate erred in Law and fact in awarding the Respondents twelve (12) months' pay without establishing a sound judicial principle to warrant the same.

29. The appeal before me, is a first appeal, and my role 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. The Court of Appeal in *Musera vs. Mwechelesi & Another* ([2007]) eKLR 159: stated as follows in regards to appeals:

> "We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion."

30. In regard to the Appellant's first ground of appeal, which raises the question of whether the Respondents proved their case before the Trial Court, it is not disputed that all the Respondents testified in support of their case. The Appellant presented a total of two witnesses, one being the Human Resources Manager and a document examiner.

31. The Respondents' testimony is that they were in the service of the Appellant before they were verbally dismissed and without notice or pay in lieu of notice. They told the Trial Court that their engagement with the Appellant was not documented, the Appellant having failed to issue them letters of appointment and pay slips.

32. The Appellant's witness who was also the Human Resources Manager, told the Trial Court that he did know how long the Respondents were in the service of the Appellant as there were no records. He confirmed that he did not himself have an appointment letter. His further evidence is that the Respondents were not taken through any form of disciplinary hearing nor did he know or have evidence to show how much they were paid.

33. The issues of whether, and for how long the Respondents worked for the Appellant, are matters that were within the knowledge of the Appellant, and who could have controverted the Respondents case by production of documentary evidence in this respect. The appellant did not during trial provide evidence such as letters of appointment to indicate when she employment the Respondents and when they separated and the manner in which the separation took place.

34. Further, the Appellant's submission in respect to the period the Respondents were in her employ is sufficient proof that they were indeed at one time in the service of the Appellant.

35. The Appellant as the employer bore the burden of showing the exact period the Respondents were in her service and how much their monthly salary was so as to disapprove the Respondents' case.

36. Section 9 of the *Employment Act*, provides as follows in respect of contracts of service:

> " General provision of contract of service
>
> (1) A contract of service—
>
> > (a) for a period or a number of working days which amount in the aggregate to the equivalent, of three months or more; or
> >
> > (b) which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months, shall be in writing.
>
> (2) An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with subsection (3)."

37. The provisions of the *Employment Act*, are applicable to both oral and written contracts. By dint of the provisions of Section 9 stated herein above, the Appellant was under obligation to reduce the Respondents contracts into writing, and she did not. Further Section 20 of the *Employment Act* states:

> " An employer shall give, a written statement to an employee at or before the time at which any payment of wages or salary is made to the employee."

38. Section 74 of the *Employment Act*, further demands that an employer keeps a record of employees employed by him/her. The Appellant operated in total violation of these salient tenets of the law on employment, to the extend that even her own Human Resources Manager had no letter of appointment as at the time he was testifying on her behalf. This to say the least, is quite an indictment on the Appellant's mode of operation.

39. It is only the Appellant who could have proved to the court the period the Respondents were in her service by producing their contracts of employment or pay slips, which she did not produce. The law places the obligation to put employment agreements into writing on the employer's door step. In the case of *Robai Musinzi v Mohamed Safdar Khan* (2012) eKLR, the court held that under the *Employment Act*, a verbal contract is a contract that can confer rights and can be enforced and employers should seek at the earliest opportunity to reduce oral contracts of employment into writing.

40. The Respondents having testified in support of their case and the Appellant not having tendered evidence to controvert the Respondents case, confirms that the Trial Court was right in holding that the Respondents had proved their case on a balance of probability. The Appellant's failure to issue the Respondents with appointment letters acts to her detriment, as the court is left to interpret the employment relationship between the parties for lack of documentary evidence.

41. The second ground of appeal, is that the Trial court misdirected itself in interpreting Sections 26, 41, and 45 of the *Employment Act*, 2007. The Sections provides for basic minimum conditions of employment, the employees' right to be told and heard when an employer is considering termination/dismissal, and the need for valid and fair reasons for termination/dismissal.

42. The Appellant's witness told the Trial Court that the Respondents were not taken through any form of disciplinary process. He further gave various reasons that informed the Respondents' dismissal, including insubordination and absconding duty.

43. The Appellant in her submissions told the court that the Respondents committed acts of gross misconduct and were summarily dismissed pursuant to Section 44(4)(1) of the *Employment act*, 2007. Post Article 47 of *the Constitution* and Section 4 (4) of the *Fair Administrative Actions Act*, it is no longer possible to summarily dismiss an employee without according them fair process. Procedure is now both a constitutional and a statutory requirement and which is absolute and unassailable.

44. In the absence of fair procedure and substantive justification for termination/dismissal, termination would be unfair. In the case of *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the Court held that the *Employment Act* has made it mandatory by virtue of Section 41 for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated by the employer and is entitled to have a representative present.

45. In a further case of *Loice Otieno v Kenya Commercial Bank Limited* Cause No. 1050 of 2011, the court held that it is a mandatory requirement to comply with the principles of Natural Justice in summary dismissal from employment.

46. The Appellant made no effort to comply with the tenets of fair procedure in dismissing the Respondents, not to mention that the Respondents were not told the various reasons for their dismissal. The dismissal was made devoid of both procedure and substantive justification.

47. I find and hold that the Trial Court properly applied the law in arriving at the verdict of unfair termination of the Respondents.

48. The last ground of appeal is that the Learned Magistrate erred in Law and fact in awarding the Respondents twelve (12) months' pay without establishing a sound judicial principle to warrant the award.

49. The finding of unfair termination, no doubt entitled the Respondents to compensation in accordance with Sections 49 and 50 of the *Employment Act*. (See *Benjamin Langwen v National Environment Management Authority* (2016) eKLR.

50. The Court of Appeal addressed the issue of awards in the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal No. 42 of 2015, where the court held:

> " remedies for unfair termination is provided for in section 49 of the Act. They include, payment equivalent to a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as the conduct of the employee, which to any extent caused or contributed to the termination."

51. In the case of *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum of 12 months pay must be based on sound judicial principles, and that the trial Judge must justify or explain why a Claimant is entitled to the maximum award.

52. The Trial Court in this matter did not give reasons that may have entitled the Respondents to maximum compensation. Considering the 13 factors set out under section 49 (4) of the *Employment Act*, (See *Alphonce Maghanga Mwachanya v Operation 680 Limited* [2013] eKLR) the Respondents' evidence in respective of their length of service with the Appellant, and the now settled principle that remedies are not aimed at facilitating the unjust enrichment of aggrieved employees but to redress economic injuries in a proportionate way (See *Elizabeth Wakanyi Kibe v Telkom Kenya Ltd* [2014] eKLR),

53. Consequently, I find that the Respondents have not proved a case for maximum compensation, and the Trial Court's award of 12 months' salary in compensation for unfair termination is set aside, and substituted therewith seven (7) months' salary as compensation for unfair termination for each of the Respondents herein.

54. The other awards by the Trial Court shall remain undisturbed.

55. This appeal having partially succeeded, each party shall bear their own costs of the appeal.

56. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 14TH DAY OF JULY, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Appellant

Mr. Odhiambo present for the Respondent

MS. Christine Omollo - Court Assistant.