



**Be Energy Limited v Atsango (Appeal E016 of 2021)
[2022] KEELRC 12686 (KLR) (23 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12686 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL E016 OF 2021
NJ ABUODHA, J
SEPTEMBER 23, 2022**

BETWEEN

BE ENERGY LIMITED APPELLANT

AND

COLLINS NGAIRA ATSANGO RESPONDENT

JUDGMENT

1. By a memorandum of Appeal filed on 2nd November, 2021, the appellant faulted the judgment in Court below (Hon. C.R.T. Ateya) delivered on 30th August, 2021 on grounds inter alia:
 - a. The Learned Magistrate erred in Law and in fact in failing to appreciate the proper effect and purport of the evidence before it and in arriving at a decision, which is not supported by and/or is manifestly against the weight of the evidence and the law.
 - b. The learned Magistrate erred in Law and in fact in failing to find that the respondent was charged on his personal capacity and therefore no responsibility accrues to the Appellant and therefore wrongly awarded the Applicant Ksh. 750,000/= purportedly being the deposit paid as costs of the criminal charges in CMCR 2913 OF 2018 against the Respondent where the Appellant was neither the complainant nor a witness.
 - c. The Learned Magistrate erred in Law and in fact in awarding damages applicable for and equivalent for malicious prosecution being Ksh. 750,000 when there was no such a case before her.
 - d. The Learned Magistrate erred in Law and in fact in awarding the 12 months' maximum compensation without giving reasons for exercising such discretions hence the discretion was exercised judiciously leading to a wrong award of 12 months' compensation which is inordinately high.



- e. The Learned Magistrate erred in Law and in fact in awarding damages of Ksh. 840,000 without any justification at all and without any prayer for the same.
2. In support of the appeal, Mr. George Gilbert for the appellant submitted among others that a keen look at the prayers sought reflected prayers for declaration on constitutional violations. Prayer (a) sought declaratory judgment while prayer (b) sought an award for damages as per the anticipated declaration on constitutional violations in prayer (a). The body of the pleadings revealed no claim for constitutional violations which were therefore neither pleaded nor proved. According to counsel the awards made by the trial Court were not prayed for at all. The respondent was therefore not entitled to reliefs not prayed for. In this regard counsel relied on the case of *David Sitonga Ole Tukai v Francis Arap Muge & others* CA No. 76 of 2014 and *Bernard Njoroge Kibaki t/a Njowa Njemu Enterprises -v- Equity Bank Ltd & Another* 2020. eKLR where the Court of Appeal held that it was well established that the Court will not grant a remedy which has not been applied for and that it will not determine issues which the parties have not pleaded.
 3. Mr. Gilbert further submitted that the award of Ksh.750,000/= made by the trial Court purportedly arising from legal fees paid by the respondent to his advocate for representation in ELD CMCR 2913/18 was in an error of law and fact. The award was wrongly made as the respondent provided no evidence to support it. In making the award, the learned trial Magistrate turned herself into a taxing Master by awarding costs in a matter that was not before her for determination.
 4. According to Counsel, the respondent was charged in his personal capacity and not as an employee of the appellant. Further the appellant was neither a complainant nor a witness in the criminal charges facing the respondent.
 5. Regarding the payment of Ksh.750,000/-. Counsel submitted that there was contradictory evidence over the claim that the respondent sold his car at the same time putting it up as a collateral. The respondent left custody at 1.00pm and paid his lawyer's fees the same evening. He also stated that he sold the car after some days and also put it up as a collateral. This testimony according to counsel was contradictory and full of falsehood hence could not be believed.
 6. Concerning leave, counsel submitted that the trial magistrate erred in awarding leave for one year being Ksh. 35,000/=. By making the award, the Court failed to appreciate the proper purport of the evidence before it. Leave was only pleaded but no evidence was led to prove the same. The respondent did not even lead any evidence that he was denied leave. Further clause 5 of the contract of employment stated that the Company would not pay cash in lieu of leave not taken and that leave could not be carried forward and would be lost if not taken unless expressly agreed by management.
 7. Concerning the award of 12 months' salary in compensation, Counsel submitted that while maximum compensation was provided for under section 49(1)(c) such an award was discretionary rather than mandatory, to be awarded according to the circumstances of the case. The discretion ought to be exercised judiciously. The respondent did not demonstrate that the separation was so unfair and tainted with malice or bad faith and neither did he plead the same. To this end Counsel relied on the case of *Monica Imali Muliango v Catherine Maseka* [2019] eKLR and *Kiambaa Dairy Farmers Co-operative Society Ltd -v- Rhoda Njeri and 3 others* [2018] eKLR.
 8. Counsel further submitted that in awarding compensation, the Courts are guided by the period of time worked and the conduct of the claimant. According to Counsel, based on the fact that the respondent had worked for only one year and five months, and no malice or illegality was demonstrated either in the plaint or during the hearing. The justifiable award if any, ought to have been one months' salary.



9. Mr. Gilbert further submitted that the award of the trial Court contained arithmetical errors amounting to Ksh. 315,000/= and the correction could have proceeded by way of review save that the rest of the awards were equally flawed and deserved to be appealed.
10. Mr. Mukhabane for the respondent submitted in the main that the procedure to be followed when terminating the services of an employee are contained in section 41,43 and 45 of the *Employment Acts* and were summarized in the case of *Janet Nyandiko -v- Kenya Commercial Bank Ltd* [2017] eKLR. Regarding leave, counsel submitted that during the respondent's employment, the Appellant denied the respondent his lawful leave and neither did the Appellant pay in lieu of leave.
11. Counsel further submitted that the respondent in the course of his employment was arrested and charged on account of the Applicant Company operating a business of storage of petroleum products without a valid license. The respondent was forced to incur expenses in defending himself and paid advocates fees in the sum of Ksh. 750,000/= which was proved by production of relevant receipts. Since the respondent was arrested in course of his employment for the appellants wrongdoing, the appellant ought to have covered these expenses.
12. This being the first appellate Court, an appeal to it is by way of a retrial. Its role therefore is to re-evaluate, re-analyze and reconsider the evidence and draw its own conclusions, of course bearing in mind that it did not see witnesses testifying and hence give due allowance for that.
13. The appellant has complained in the main that the trial Court erred in failing to appreciate the proper effect and purport of the evidence before it hence arriving at a decision which was not supported by the weight of evidence and law. Further that the learned Magistrate erred in failing to find that the respondent was charged in his personal capacity and therefore no responsibility accrues to the appellant and therefore wrongly awarded the respondent Ksh. 750,000/= purportedly paid as costs for criminal charges against the respondent.
14. The respondent in his evidence before the trial Court stated in material part that the licenses were procured by the appellant and that he was arrested on 15th July, 2018 from the office. He spent the night in custody and on 16th July, 2018 his advocate appeared in court. In cross-examination he stated that he was the one charged and that none of the witnesses worked for the respondent. The charge sheet did not indicate that he was charged as an employee of the respondent. The alternative charge was that he failed to display the license. He further stated that it was not disputed that the appellant was his employer and that he did not have a license for storing petroleum products.
15. Concerning payment of Ksh.750,000/= to his advocate, the respondent stated that he paid his lawyer the money as legal fees however he did not have the evidence in court and further that he had not paid the amount in full.
16. On this issue the trial court observed as follows:

“The claimant produced a receipt dated 16/7/2018 issued by Tunoi & Company Advocates being deposit towards legal fees in ELD CR. No. 2913 of 2018 of Ksh.750,000/=. He testified that he paid the firm of Tunoi to represent him in the Criminal case. The Evidence of the respondent was that they instructed an advocate to represent the claimant but he chose to use his own... The claimant stated that he sold his car by putting it up as a collateral for legal fees”



17. On this issue the Court observes that the respondent was arrested at his work place being BE Energy Limited. The particulars of the charge stated that:

“On 15th day of July, 2018 at Maili Inne in Eldoret West Sub County within Uasin Gishu County you were found to have stored Petroleum products at Bakri Energy Petrol station without a valid license issued by Energy Regulatory Commission.
18. The Court further notes the appellants stated as captured by the trial Magistrate in her judgment that they offered to hire an advocate to represent the respondent but he chose to have his own. From the foregoing, it therefore cannot be true that the charges the respondent was facing were in his personal capacity and had nothing to do with the Appellant. The truth of the matter is that the respondent was arrested while performing his lawful duties for the appellant. He was therefore justified in making a claim for refund of legal expenses incurred in defending himself against the criminal charges as the alter ego of the appellant.
19. Concerning the amount of legal fees paid, the Court is however not persuaded that this was sufficiently proved before the trial Magistrate to warrant the award. The claimant in his evidence summarized above stated that he sold his car as a collateral to pay the legal fees. He further stated that he had not paid the fees in full. He further stated that he did not have evidence of payment before the Court.
20. Curiously the learned trial Magistrate made reference to a receipt dated 16th July, 2018 issued by Tunoi & Company advocates and further observed that the respondent sold his car by putting it up as a collateral for legal fees.
21. Concise Oxford English Dictionary defines a collateral as something pledged as security for repayment of a loan. It is therefore a contradiction in terms to say that the respondent sold his car as a collateral for legal fees. Further the claimant in his evidence stated that he had not completed paying the legal fees and further that he had nothing before the Court to show he actually paid the firm of Tunoi the said Ksh. 750,000/=. The forgoing contradictions made it unsafe to rely on the evidence before the trial Court to reach a finding that the respondent actually paid the said monies to the firm of Tunoi. The receipt issued by Tunoi and Company might therefore be a hollow receipt not backed by actual payment of money. This ground of appeal therefore succeeds and the award of Ksh. 750,000/= on account of legal fees is hereby set aside.
22. On the issue of unfair termination, the respondent stated that he was not a station manager and that he was a pump attendant he was issued with a show cause letter and responded to the same. He was however not invited to any disciplinary hearing. According to him there was no issue with shift reconciliation.
23. The Appellant’s witness Ms. Maureen Lukani Khoyeti stated in cross-examination that the respondent was not accorded a hearing before termination. He was given summary dismissal.
24. It is requirement under section 41 of the [Employment Act](#) that before a termination is effected, an employee ought to be given the reasons for which termination was being considered and granted an opportunity to make representation over those reasons. In this particular case, the appellant’s own witness admitted that the respondent was not given such an opportunity. The termination was therefore rightfully found to be unfair.
25. Regarding the quantum of compensation, it is correct that the maximum award of 12 months’ salary ought to be reserved for exceptional circumstances. It ought to be made in the most egregious of cases. The evidence before the trial Court did not demonstrate that the respondent was terminated under such circumstances to warrant the maximum award. This ground of appeal therefore succeeds.



26. The respondent from the evidence had worked for the appellant for one year and five months and was terminated on account of allegations of falsification of records and granting unauthorized credit to customers. He was terminated together with his manager over similar allegations. Considering the length of service, the circumstances and reasons for termination, an award of six months' salary for unfair termination would have been reasonable.
27. Regarding leave, the Appellant did not produce any record to show the respondent went on leave. The award for leave therefore remains undisturbed.
28. On the issue of service pay the respondent himself stated that he paid PAYE, NHIF and NSSF. The learned trial Magistrate therefore erred in making an award for service pay.
29. In conclusion the Court partially allows the appeal and substitutes its order with the order of the trial Court as follows:
- Ksh.
- a. One month's salary in lieu of notice 35,000
 - b. Unpaid leave for one year 35,000
 - c. Six months' salary as compensation for unfair termination 210,000
280,000
 - d. Items (a) (b) and (c) are subject to taxes and statutory deductions
 - e. The appeal being partially successful, each party to bear their own costs of the Appeal.
30. It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 23RD DAY OF SEPTEMBER, 2022

Abuodha Nelson Jorum

Judge ELRC

