



**Mega Garment Industries Kenya (EPZ) Ltd v Owino (Appeal E09 of 2020)
[2022] KEELRC 12971 (KLR) (28 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12971 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E09 OF 2020
B ONGAYA, J
OCTOBER 28, 2022**

**BETWEEN
MEGA GARMENT INDUSTRIES KENYA (EPZ) LTD CLAIMANT
AND
WESLEY ONYANGO OWINO RESPONDENT**

(Being an appeal against the entire judgment and decree by the Honourable G.Kiagi (SRM) dated and delivered on 11.11.2020 in Chief Magistrate's Court at Mombasa ELRC Case No. 38 of 2019)

JUDGMENT

1. The appellant filed the memorandum of appeal on 25.10.2021 through Onyango Oballa & Partner's Advocates. The memorandum of appeal has enumerated five grounds of appeal as follows:
 1. That the learned magistrate erred in law and in fact in awarding Kshs 26,730 as compensation for un-expounded contract.
 2. That the learned magistrate erred in law and in fact in awarding Kshs 41,624 as leave for 4 years in spite of the evidence on record showing payment of the same.
 3. That the learned magistrate erred in law and in fact in awarding salary in lieu of notice of Kshs 14,866.
 4. That the learned magistrate erred in law and in fact in holding that the claimant was unfairly terminated when the evidence given showed the claimant returned to work upon apology.
 5. That the learned magistrate erred in law and in fact in awarding Kshs 89,195 being compensation for unfair termination.
2. The appellant prayed for orders:



- a. The judgment and decree of the Hon G. Kiage delivered on 06.11.2020 to be set aside and the court does dismiss the claimant's claim in the lower court.
 - b. The appellant's appeal be allowed with costs.
 - c. Such and any other orders as this honourable court will deem fit.
3. Both parties filed their respective submissions.
 4. This being a first appeal, the role of the Court is to review the evidence before the trial Court and make conclusions bearing in mind that unlike the trial Court, this Court exercising the appellate jurisdiction has not by itself seen the witnesses and taken the evidence as was given by those witnesses. The guiding principles on the Court's role in the appeal is as was held in *Selle –Versus – Associated Motor Boat Co. of Kenya & Others* (1968) EA 123, that an appeal from a trial court is by way of a re-trial and the principles upon which the Court acts (as of first appeal) are that the Court must 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. Further, the Court is not bound to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally per *Abdul Hameed Saif –Versus – Ali Mohamed Sholan* (1955)22 EACA 270. The Court is guided accordingly.
 5. The case before the trial court was as follows. The respondent in this matter filed a memorandum of claim dated 18.01.2019 through Thabit, Wampy & Kitonga advocates. The claimant pleaded that on 12.10.2018 he was summoned to the human resources office because he had entered a wrong figure on the productions board. Following the incident he was sent away. It is the claimant's contention that the termination came to him as a shock as he did not believe he had done something wrong - and that it all had happened suddenly without a notice of termination and no disciplinary meeting was held. The claimant claimed and prayed for:
 - a. A declaration that his termination by the respondent was unfair.
 - b. Terminal dues being a month notice payment Kshs. 14, 866.00; 4-years' leave payment Kshs. 41, 624.00; unremitted NSSF for 7-months in 2014 Kshs. 2, 800.00; un expounded contract 12.10.2018 – 22.12.2018 2months x 14, 866 = Kshs.29, 732.00; and 12 months' compensation for unlawful termination Kshs. 178, 392.00. Total claim Kshs. 267, 414.00.
 - c. Certificate of service.
 - d. Costs of the claim and interest thereon at court rates.
 - e. Any other relief that the Honourable court may deem fit to grant.
 6. The appellant filed a memorandum of response on 20.06.2019 through Onyango Oballa & Partner's Advocates. The appellant pleaded that it employed the claimant on 6-months term contracts, each being a standalone contract. The contracts provide for an option of payment in lieu agreed leave being 2-days of leave per month. Further, the contracts are not renewable upon expiry but new contract could be entered between parties. The appellant maintains a biometric system tied to payroll and which provides all relevant employee details.
 7. The appellant further pleaded as follows. The respondent's (claimant's) allegations and claims are denied. By letter dated 06.01.2018 the respondent applied to be employed by the appellant. He was



granted a short term contract of employment as an Industrial Engineer running from 12.01.2018 to 11.07.2018 and then, 03.07.2018 to 22.12.2018. his leave days for the period was paid at his Cooperative Bank Account. He worked well until October 2018 when he deserted duty. by a letter dated 16.05.2018 (actually 16.05.2019) he apologised and requested to resume duty and the appellant accepted the request. He diligently worked from 18.05.2019 to 12.06.2019. From 13.06.2019 the respondent absconded duty again and on 18.06.2019 the respondent delivered to him a registered mail as notice to report on duty by 28.06.2019 failing which he would be deemed to no longer have interest to work for the respondent. A telephone number for communication was provided. The appellant pleaded that the respondent was therefore not entitled to any of the reliefs. It was prayed that the respondent's suit is dismissed with costs.

8. The Court has considered all the material on record including the submissions filed for parties in this appeal and makes pertinent findings as follows.
9. The 1st ground of appeal is that the learned magistrate erred in law and in fact in awarding Kshs 26,730 as compensation for un-expounded contract. The Court has considered the pleadings, the submissions, and the evidence before the trial Court. The contractual basis of the claim and prayer were not established at all. The Court has perused the trial Court's judgment and the trial Court offered no justification for the award. As submitted for the appellant, the relief is mysterious as it is not mentioned in section 49 of the Employment Act or any other statutory or contractual provision. The first ground of appeal must succeed.
10. The 2nd ground of appeal was that the learned magistrate erred in law and in fact in awarding Kshs 41,624 as leave for 4 years despite of the evidence on record showing payment of the same. The trial Court gave no justification for the award. As submitted for the appellant, at the hearing the respondent testified that under the 6-months' contracts he was entitled to 2 days of leave per month and per pay slip for June to July 2018 he had been paid 8 days of leave. As submitted for the appellant the respondent was required to strictly prove his claim for leave payment but failed to do so. The Court finds that by his own testimony verified by the pay slips, on a balance of probability the appellant had honoured the contractual clause to pay for 2-leave days per month. Further, as submitted for the appellant, the claim for leave for 2014 was time barred under section 90 of the Employment Act, 2007 prescribing 3-years of limitation generally for claims under a contract of service (running from the date of the alleged default) and, 12-months from cessation of a continuing injury. The 2nd ground of appeal will therefore succeed.
11. The 3rd ground is that the learned magistrate erred in law and in fact in awarding salary in lieu of notice of Kshs 14,866. The Court finds that the ground will succeed. As will be shown later, there was no established unfair or unlawful termination. Instead, it will be shown that the claimant was not terminated at all. The Court therefore finds that the award was in error.
12. The 4th ground is that the learned magistrate erred in law and in fact in holding that the claimant was unfairly terminated when the evidence given showed the claimant returned to work upon apology. The respondent alleged that he was terminated on 12.10.2018 and unfairly so. It was stated that at that time he was serving on a 6-months' contract running from 03.07.2018 to 22.12.2018 - so that he had only 2 months and 10 days to go as at the time of the alleged unfair termination. A demand letter was written in that regard on 20.11.2018. It is not clear if the demand notice was actually delivered and in cross-examination DW1 denied receiving that letter. The suit was filed on 18.01.2019. The claimant wrote the letter dated 16.05.2019 requesting to be allowed to continue in employment. He wrote that he had left in October 2018 without informing his HoD or management because he had serious domestic and family issues he had to go and settle. He then concluded, "I apologise for the mistake and promise not to repeat that again." In his testimony he stated, "I was asked to sign a new contract on



condition that I would withdraw this case. I refused to withdraw the case....” The Court finds that the respondent voluntarily wrote the hand-written letter of 16.05.2019. Further, he had not shown that he was intimidated or coerced to author and sign it. The apology must be taken to be his true account of his conduct in October 2018. DW1 had testified that after absconding, the respondent had been in contact with his immediate supervisor and DW1 had called him and he had indicated he had domestic issues to deal with. The Court finds that there is no reason to doubt the respondent’s account which is consistent with the claimant’s own apology letter that he had absconded on account of his domestic problems he was handling.

13. While the respondent tried to connect the apology letter to the suit he had already filed, the pleadings were never amended accordingly and his testimony in that regard must have been a mere afterthought, at the end of the re-examination. The trial Court found that the appellant had merely alleged absconding without steps taken to trace the respondent. The Court finds that the trial Court’s finding was in error and inconsistent with the evidence by DW1 that DW1 had even called the claimant who indicated he had domestic problems – demonstrating that he had deserted; with no intention to attend to duty as employed but, to concentrate on his domestic problems. Again, the Court considers that the respondent’s letter of apology confirms that indeed the claimant had voluntarily absconded duty and the alleged termination was an unfounded account. The evidence was that there had been no termination at all. There was also no reason to doubt the account by DW1 that the respondent had received the warning on 20.09.2018 which he duly acknowledged by signing but which, in his account he had not mentioned at all.
14. Taking all the evidence into account, the Court returns that there was no established basis to doubt the employer’s account compared to the respondent’s incoherent conduct and testimony which was inconsistent with his own pleading. The 4th ground of appeal will therefore succeed.
15. Consequential to that finding, ground 5 of the appeal must succeed so that the learned magistrate erred in law and in fact in awarding Kshs 89,195 being compensation for unfair termination. In any event, the trial Court never mentioned or considered the factors in section 49 of the Act which guide the making of such an award. The Court has found that the respondent had about 2months and 10 days of unexpired 6-months’ contract so that if he had served, then the award was inconsistent with the contractual due remuneration if, the contract had been fully performed. It was therefore an unfair award.
16. In conclusion, the appeal is determined with orders:
 1. The judgment by the trial court delivered on 06.10.2020 together with the decree and all process flowing therefrom is set aside.
 2. The respondent’s suit before the trial Court stands dismissed with costs.
 3. The appeal is allowed with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 28TH OCTOBER, 2022.

BYRAM ONGAYA

JUDGE

