



**Agricultural Society of Kenya v Kwambai & another (Civil Appeal
E34 of 2019) [2022] KEELRC 12962 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12962 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E34 OF 2019
MN NDUMA, J
OCTOBER 27, 2022**

BETWEEN

THE AGRICULTURAL SOCIETY OF KENYA APPELLANT

AND

BENJAMIN KWAMBAI 1ST RESPONDENT

COMPLIANCE AUCTIONEERS 2ND RESPONDENT

*(Being an Appeal against the Decree and Judgment of the Honourable
Chief Magistrate's Court Hon. P. Ngare Gesora (Mr.) Delivered on
30th July, 2019 in Nairobi CMCC No. 969 of 2009 at Milimani)*

JUDGMENT

1. The appellant, The Agricultural Society of Kenya being dissatisfied with the whole of the judgment of the Honourable P Ngare Gesora (Mr) Chief Magistrate dated and delivered on July 30, 2019, filed a Memorandum of Appeal dated August 30, 2019 in which the following summarized grounds of appeal are set out: -
 - i. The trial Court erred in law and in fact by wrongly assuming jurisdiction of an employment matter.
 - ii. The trial Court erred in law and in fact in failing to consider that the suit as filed was statute barred.
 - iii. The trial Court erred in applying the law retrospectively.
 - iv. The trial Court erred in failing to allow the appellant to call their witness during trial.
 - v. The trial Court erred in law and fact by finding that the appellant was in breach of the contract of employment.



- vi. The trial Court erred in holding the appellant liable for the loss suffered by the respondent.
 - vii. That the judgment of the Court was against the weight of the evidence.
 - viii. That the trial Court failed to appreciate that the appellant is not a Legal person as such no orders can be issued in the manner proposed in the impugned judgment.
2. The parties filed written submissions and the facts of the case may be summarized as follows: -
 3. The suit was initially filed vide a plaint dated February 19, 2009. The plaint was subsequently amended and the Defendant “The Agricultural Society of Kenya” was substituted with JR Njenga, David K Kiilu, Brown Ondego, I Mbogori, Isaac Njogu, Ruth Saina, Nelson N Ogombe, GK Mwai, William K Martin (sued as the Registered Trustees of the Agricultural Society of Kenya). The amended plaint is dated January 26, 2010.
 4. The plaintiff in the suit was an employee of the respondent in the position of a Registry Clerk at the Head Office. That on or about the January 19, 2009, the defendants without any just cause or lawful excuse summarily dismissed the plaintiff from its employment.
 5. The plaintiff alleged that the summary dismissal was wrongful, and was entitled to general damages in respect thereof. The plaintiff in addition sought an award of special damages constituting unpaid terminal dues in the sum of Kshs 255,788 specified in the plaint.
 6. The amended Statement of Claim is stamped January 26, 2010 and the Court correctly finds this to be the date the same was filed and received at the registry of Milimani Chief Magistrate’s Court at Nairobi.
 7. The Defendant’s Statement of Defence is stamped January 18, 2010 which was in response to the initial plaint as filed against “Agricultural Society of Kenya Limited.”
 8. From the record, it appears no amended statement of defence was subsequently filed by the defendant.
 9. The respondent filed a Preliminary Objection to the suit on December 21, 2009. The Preliminary Objection was determined by a ruling of the Hon Magistrate Mr Kiema delivered on November 17, 2010 in which the Preliminary Objection on the suitability of the case was dismissed.
 10. The defendant appealed the ruling of the trial Court to the High Court which appeal was dismissed by the High Court and the suit proceeded to trial.
 11. At the outset, the Court will proceed to determine whether the suit was statute barred by fact of late filing. This is a matter that goes to the jurisdiction of the Court to hear and determine the suit in the first place and it may be considered at any time even before an appellate Court where the trial Court did not deal with the same. See the decisions in *Devicon v Samani* (1995-1998) and Civil Appeal No 21 of 2015 - *The Hon Attorney General and 2 others versus Andrew Maina Githinji and Zachary Mugo Kamunjiga*
 12. From the facts apparent from the pleadings by both parties which are not in dispute, the amended plaint was filed on January 26, 2010 and the cause of action arose on January 19, 2009 when the plaintiff was summarily dismissed. The amended plaint was filed about one year from the date the cause of action arose. The initial plaint had been filed earlier on February 19, 2009. The Statement of Defence was filed on January 18, 2010.
 13. In terms of Section 90 of the *Employment Act, 2007*, a suit based on a contract of employment must be filed within three (3) years from the date the cause of action arose.



14. It is therefore beyond per adventure that this suit was filed within the three years limitation period and was therefore not statute barred. This ground of appeal is therefore dismissed for lack of merit.
15. The ground of appeal by the appellant that the trial Court lacked jurisdiction to hear and determine an employment dispute as at the time the amended plaint was filed on 26th January, 2010 was not canvassed by the trial magistrate before or during the hearing of the trial before the Magistrate Court. The appellant submits that the magistrate's Court lacked jurisdiction to entertain the suit from the date of filing up until the date the judgment was delivered. That upon establishment of the Employment and Labour Relations Court pursuant to Article 162(1) of the Constitution read with Section 12 of the Industrial Court Act, 2011, the Magistrate Court ought to have downed its tools and transferred the matter to the Employment and Labour Relations Court upon application by the parties.
16. The appellant relies on the case of Registrar of Trade Unions v Nicky Njuguna and 4 Others [eKLR) where the Court of Appeal held that Employment and Labour Relations Court had jurisdiction to deal with all constitutional matters intertwined with Employment and Labour matters.
17. In the present case, however, there are no constitutional issues for determination. The determination of the dispute is predicated on interpretation of a contract of employment and the provisions of Employment Act, 2007.
18. As at the time this suit was filed in 2009, the Employment and Labour Relations Court had not been established and the High Court and the subordinate Courts had jurisdiction to hear and determine all disputes premised on employment contracts.
19. The Industrial Court as then constituted was primarily dealing with collective labour disputes. As at the time, the judgment of the Court was delivered on 30th July, 2019, the Chief Magistrate's Court had been clothed with jurisdiction to hear and determine employment disputes in terms of the Employment Act, 2014 vide a gazette by the Hon The Chief Justice creating Special Employment Courts within the Magistracy to deal with all matters in which the plaintiff did not earn more than a monthly salary of Kshs 80,000. The plaintiff, herein earned a monthly salary of Kshs 29, 514 at the time of termination of his employment. The submissions by the appellant that the trial Court lacked jurisdiction to entertain this suit at the time of filing this suit up to the time of delivery of judgment, lacks merit and is dismissed.
20. As to the ground that the trial Court applied the law retrospectively, that submission is not borne out of the judgment of the Court. The Court applied the provisions of the Employment Act, 2007 which became operational on August 2, 2008. This was the law applicable as at the time the suit was filed in 2009 and at the time judgment was delivered on July 30, 2019. This ground of appeal lacks merit and is dismissed.
21. The trial magistrate, carefully analysed the facts of the case and came to the conclusion that: -
 - “The plaintiff was not afforded a chance to be heard and consideration be made on his representation as envisioned by Section 41(2). This makes me conclude the termination herein was unfair as set out in Section 45 of the Act. He is entitled to compensation having suffered loss and damage.
22. This finding was based on the evidence adduced before Court by PW1, the plaintiff. PW1 was cross-examined by Mr Omboko for the defendant and was re-examined by Mr Jaoko for the plaintiff subsequent to which Mr Jaoko closed the claimant's case. Mr Omboko, opted not to call any witness in defence of the suit since the witness statement of the witness he intended to call had been expunged from the record for late filing on December 14, 2018 without leave of the Court despite the fact that



the hearing of the suit had commenced *ex parte* on December 5, 2018, when the representative of the defendant did not appear for the hearing.

23. On December 11, 2018, Mr Ndolo moved an oral application for the *ex parte* proceedings to be set aside on the grounds that Counsel for the plaintiff had proceeded with the hearing of the suit in the absence of Counsel for the defendant at a time other than the one allocated.
24. Counsel for the plaintiff, offered the plaintiff for cross-examination and the Court re-opened the plaintiff's case and the plaintiff was recalled for cross-examination.
25. On December 14, 2018, Mr Jaoko objected to the late filing of the witness statement by the defence since it was filed without leave. Upon hearing Mr Omboko for the defendant, the witness statement was expunged.
26. These were the circumstances under which Mr Omboko closed the respondent's case and informed the Court that: -

“I have a witness. We will not call her as her statement has been expunged. We rely on documents produced by the replying affidavit signed by one Batram Muthoka.

27. . The Court notes that no application was made to the magistrate to review his decision to expunge the witness statement nor was an appeal filed against the decision. The decision not to call any witness was made by Counsel for the defendant. The learned trial Court did not make any ruling prohibiting the defendant's from calling any witness they intended to call.
28. The grounds of appeal that “the trial magistrate erred in law and in fact in failing to appreciate that the appellant was not granted the opportunity to call their witness during trial” is misconceived and not borne out of the record of the proceedings. If indeed the defendant wished to call any witness, they ought to have made a specific application to that effect and for the Court to make a ruling in that respect.
29. If the defendant was aggrieved by the ruling that expunged the witness statement from the record for late filing, an application for review of that decision by the trial Court or an appeal against the ruling ought to have been filed timeously and within the timelines and guidelines for such filing set out under the *Civil Procedure Act*, and the Rules. That did not happen. This ground of appeal lacks merit and is brought too late in the hour and is therefore dismissed.
30. With regard to the reliefs granted by the learned trial magistrate, once a Court finds that a termination of employment is unlawful and unfair in terms of Section 45 of the *Employment Act, 2007*, the Court is bound by the provisions of Section 49 in awarding any reliefs sought by the plaintiff. See the Supreme Court decision in *Kenfreight (E.A.) Limited -vs- Benson Nguti* [2016] eKLR where the Supreme Court stated:-

“Guided by the above analysis, we find that once a Court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is one provided under Section 49(1) of the *Employment Act*. We also need to clarify that a payment of an award in Section 49(1) (a) is different from an award under Section 49(1) (b) and (c). Section 49 allows an award to include any or all of the listed remedies provided that a Court in making the award, exercises its discretion judiciously and is guided by Section 49(4) (m)



31. The Court is also guided by the provisions of the *Employment Act*, and the evidence adduced before Court in determining whether or not the plaintiff is entitled to the reliefs sought.
32. In terms of the amended plaint, the plaintiff sought the following reliefs particularized under paragraph 8 thereof.

“Particulars of special Damages

- a. Terminal dues/benefits being 8 years and 8 months – Kshs 255, 788.
- b. Over surrender of imprest.
- c. Medical advance wrongly deducted from salary.
- d. Medical claims.
- e. Subsistence allowance not paid on point.”

33. The plaintiff also sought in the final prayers “

- (b) General exemplary/punitive damages for wrongful dismissal.
- (c)
- (d) Loss of future earnings.

34. Following the Court of Appeal decision in *Selle –vs- Associated Motor Boat Company Limited* [1968] E.A 123 where Sir Clement De Lestang stated: -

“This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily 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 on probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally,”

the Court is bound to evaluate the evidence adduced by the parties afresh. In the present case, the testimony by the plaintiff was not controverted by the defendant. However, the plaintiff upon establishing that he was wrongfully dismissed on a balance of probabilities bears a further onus of proving that he is owed the special damages pleaded in this plaint.

35. In the present case, the Court only granted the plaintiff one-month salary in lieu of notice and granted loss of future earnings to the plaintiff for 12 years (29,514x12x12) in the sum of Kshs4,250,016.

36. The learned trial magistrate misdirected himself grossly. He did not abide by the provisions in the *Employment Act, 2007* and in particular Section 49 in determining the reliefs available to the plaintiff.

37. Reliefs available to an employee under Section 49(1) include: -

- (a)
- (b)
- (c) the equivalent of a number of months wage or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.



- (2)
- (3)
- (a) reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated; or
- (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.”
38. In the present case, the plaintiff in addition to the prayer for damages had in the alternative sought for reinstatement. The learned trial magistrate did not consider the alternative remedy at all.
39. However, the Court finds that this was not a suitable case to consider reinstatement or re-engagement of the claimant in view of Section 12 of the *Employment and Labour Relations Court Act*, which mandates the Court not to reinstate an employee after expiry of three years from the date of termination. The present judgment was delivered in 2019, more than 10 years from the date of termination and so this Court deems reinstatement and re-engagement to be inappropriate in the circumstances of this case.
40. The trial Court having completely overlooked the provisions of Section 49(c) (1) and (3) did not apply the guidelines set out under Section 49(4) in assessing the appropriate compensation due to the plaintiff.
41. In applying these principles, this Court notes that the plaintiff had served the defendant for a period of about 14 years and was found to have lost his employment for no reasonable cause and without the employer following a fair procedure. Since the defendant did not counter the evidence adduced by the plaintiff, the Court finds that the plaintiff did not contribute to the loss of his employment. That he suffered loss and damage. That he was not compensated nor paid terminal benefits upon being summarily dismissed.
42. Upon considering the decision of this Court in *Mary Chemweno Kiptui -vs- Kenya Pipeline Company Limited* [2014] eKLR the Court sets aside the award by the trial Court of loss of future earnings in the sum of Kshs 4,250,016 and replaces the same with an award of maximum compensation for the unlawful and unfair dismissal as set out under Section 49(1) (c) being the equivalent of 12 months’ salary in the sum of Kshs 354,168.
43. In the final analysis, judgment is entered in favour of the respondent as against the appellant as follows: -
- (a) Kshs 354,168 being the equivalent of 12 months salary in compensation for the unlawful and unfair dismissal.
- (b) Kshs 29,514 *in lieu of* one-month notice.
Total award Kshs 383,682.
- (c) Interest at Court rates from date of this judgment till payment in full.
- (d) Costs of the suit before the trial Court and this Court.

DATED AND DELIVERED (VIRTUALLY) AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022

MATHEWS N. NDUMA

JUDGE

Appearances



Mr Kithi for Appellant

Mr Ochieng Omolo for respondent

Ekale – Court Assistant

