



REPUBLIC OF KENYA



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Abyssinia Iron & Steels Limited v Mulu (Employment and Labour Relations Appeal E001 of 2022) [2022] KEELRC 12915 (KLR) (19 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12915 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2022**

S RADIDO, J

OCTOBER 19, 2022

BETWEEN

ABYSSINIA IRON & STEELS LIMITED APPELLANT

AND

PETER MUSEMBI MULU RESPONDENT

*(Being an Appeal from the judgment of the Learned trial
Magistrate W.K. Onkunya (SRM) on the 14th December 2021)*

JUDGMENT

1. In a judgment delivered on December 14, 2021, the learned magistrate found in favour of Peter Musembi Mulu in the following terms:
 - i. Unpaid house allowance of Kshs 256,446/-.
 - ii. Unpaid leave days (42 days) of Kshs 115,071/92.
 - iii. Compensation for unfair termination of Kshs 142,470/-.
 - iv. Notice pay of Kshs 71,235/-.
 - v. Salaries in part of March and April 2019 totalling Kshs 33,119/85.
 - vi. Compensation for discrimination and violation of the claimant's right to fair labour practice Kshs 2,000,000/-.
 - vii. Costs of this suit.
 - viii. Interest at court rates from the date of judgment until payment in full.



2. Abyssinia Iron & Steel Ltd (the appellant) was aggrieved, and it lodged a memorandum of appeal with the court on January 6, 2022 contending:
 - (1) That the learned magistrate erred in law and fact by failing to consider and appreciate the respondent's defence, thus entering judgment that is not supported by evidence at the trial and on record.
 - (2) That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the claimant signed a discharge form affirming that he had no claim against the respondent having been settled appropriately.
 - (3) That the learned trial magistrate erred in law and fact by awarding the sum of Kshs 2,000,000/- on account of discrimination and unfair labour practices contrary to the evidence on record and without any evidence whatsoever.
 - (4) That the learned trial magistrate erred in law and fact by wilfully ignoring the appellant's evidence that the respondent willfully resigned from work and was never terminated.
 - (5) That in all the circumstances of the case, the learned magistrate failed to do justice before the respondent.
3. The appellant filed a record of appeal on March 30, 2022 (since it was incomplete, a complete record was filed on May 20, 2022).
4. Pursuant to court directions, the appellant filed its submissions on May 20, 2022 and the respondent on June 14, 2022.
5. The court has considered the record and submissions.

Role of the court on a first appeal

6. The role of a first appellate court was discussed in *Kamau v Mungai (2006) 1 KLR 150*, where it was held that this being a first appeal, it was the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.
7. This court will abide by the interdict on its role as a first appellate court.

Whether the respondent resigned?

8. Although the appellant raised the question of the respondent wilfully having resigned as ground 4 of appeal, it did not explicitly submit on the ground, and the court considers the ground as having been abandoned.

Failure to consider the appellant's defence

9. The first ground of appeal taken by the appellant was that the learned magistrate had failed to consider and appreciate its defence.
10. The court has relooked at the statement of defence which was filed on behalf of the appellant.
11. Apart from denials and putting the respondent to strict proof, it is not easy to discern what type or the nature of defence the appellant had pleaded to the respondent's cause(s) of action of unfair termination of employment, discrimination, and breach of contract.



12. However, in the filed witness statement by the appellant's human resources manager, the claim for unfair termination of employment was denied on the ground that the contract lapsed by effluxion of time and further that the respondent opted for early retirement.
13. The court will re-examine these two defences.
14. The respondent was on a fixed-term contract from April 7, 2017 to April 6, 2019.
15. In paragraph 11 of the memorandum of claim, the respondent pleaded:

The claimant was asked by the respondent not to return to work from April 7, 2020 (sic).
16. During the examination-in-chief, the respondent stated that his contract was to end on April 7, 2019 and that he did not get any communication on the renewal of the contract.
17. The respondent further stated that since there was no communication on the renewal of the contract, he thought the contract had been renewed and, therefore, continued working (until April 9, 2019).
18. For the appellant, its witness testified that the respondent was retired on medical grounds upon presenting a medical letter dated April 9, 2019. He also stated that the respondent's last day at work was 9 April 2019, though the contract ended on April 6, 2019.
19. The respondent's contract lapsed on April 6, 2019, a Saturday. The respondent secured a medical letter on April 9, 2019 indicating that he had opted to retire on health grounds.
20. The medical letter came after the lapse of the contract (after it had lapsed by effluxion of time). The medical letter could not revive the contract that had ended. The question of retirement on age or health grounds was, consequently, an issue arising after the lapse of the contract.
21. The appellant never took a positive step to renew the respondent's contract. The respondent indicated in his pleadings that he had been instructed not to report to work after April 7, 2019.
22. In concluding that the respondent's employment was unfairly terminated, the learned magistrate stated:

The claimant was to work for a period of two years with effect from April 7, 2017 to April 6, 2019, but according to the evidence of the human resource manager, the claimant worked up to April 9, 2019, and the contract was not renewed due to intervening circumstances of the claimant's sickness. There is therefore, no dispute that the claimant worked past his contract period, and hence his contract is presumed converted as permanent and pensionable (see *Benjamin Nyambati v Egerton University (2014) eKLR*)

There is, however, no written request from the claimant regularly (sic) for early retirement. In the case of *Benson Irungu v Total Kenya Ltd (2015), eKLR* held the premature retirement of the claimant to be unfair on finding that: -

The circumstances of the above-cited authority are applicable herein. Since there is no evidence that the claimant sought for early retirement. There is no evidence that the procedure was followed before the claimant was retired. From the evidence on record, the claimant was retired at the age of 58 years before attaining the retirement age of 60 years.

I, therefore, find that the claimant was unfairly and unlawfully terminated.

23. The case *Benjamin Nyambati v Egerton University* turned on an interpretation and application of a term of a collective bargaining agreement to make a presumption that the employee therein had his



- contract converted to permanent and pensionable terms after the failure by the employer to confirm him after completion of probation period, which is not the case here.
24. The case also revolved around the interpretation and application of section 42 of the *Employment Act, 2007*, on probationary contracts. The instant case was not one of probation.
 25. It was, therefore, in error for the learned magistrate to rely on it to conclude or presume that since the respondent had worked for 3 days beyond the end of his contract, it became converted into a permanent and pensionable contract with a retirement age of 60 years.
 26. The learned magistrate also relied on *Benson N Irungu v Total Kenya Ltd* to conclude that there was unfair termination of employment because the respondent was prematurely retired.
 27. In this court's view, that conclusion was in error and did not consider the evidence before the court.
 28. The evidence before the court was that the respondent's contract had ended on April 6, 2019. By that date, the parties had not come to a mutual decision to renew or not renew the contract.
 29. Equally, there was no evidence before the court that the respondent's retirement age was 60 years or that the appellant had a policy, custom or tradition of retiring employees at 60 years.
 30. Since the contract had an end date, formal notification of the end of the contract was not legally necessary.
 31. Having reached the above conclusions, the court must consider the effect or significance of the admission by the appellant that the respondent worked for 3 days beyond the lapse of the contract (until April 9, 2019).
 32. The certificate of service issued to the respondent indicated that his contract ended on April 6, 2019. The respondent pleaded that he was instructed not to report to work after April 7, 2019. There was no factual evidence that the respondent reported to work after April 6, 2019.
 33. Assuming that was the case, the court would have deemed the respondent as having been on at-will employment, depending on the time of payment of remuneration.
 34. The learned magistrate did not consider these aspects of the appellant's case.
 35. The court finds that the respondent did not discharge the burden imposed on him by section 47(5) of the *Employment Act, 2007*, to prove, at the first instance, that an unfair termination of employment occurred.

Discrimination

36. The respondent pleaded and sought damages because the appellant had discriminated against him by retiring him before attaining retirement age, failing to pay him house allowance and withholding part of his March 2019 salary, among other reasons.

House allowance discrimination

37. In the court's humble opinion, the questions of house allowance and withholding of part salary are issues of breach of contract. They should have been adjudicated as such and not a discrimination dispute.



Retirement discrimination

38. The respondent did not place before the learned magistrate any evidence that the appellant had a policy, custom or practice to retire employees at 60 years.
39. Further, the respondent did not demonstrate that he had mutually agreed with the appellant to serve until 60 years. indeed, the appellant and respondent had a fixed-term contract, which type of contract is envisaged and recognised by sections 9 and 10 of the *Employment Act*, 2007.
40. The Kshs 2,000,000/- award for discrimination and unfair labour practices was, therefore, not sound in law.
41. The learned magistrate, therefore, fell into error by converting or deeming as converted a fixed-term contract of 2 years into one to last until the respondent reached a retirement age of 60 years and proceeding to award the damages.

Effect of the discharge voucher

42. The respondent signed a discharge voucher acknowledging receipt of terminal dues comprising accrued leave and monthly salary.
43. The appellant produced schedules indicating the respondent's leave had been commuted and paid in December 2018 and January 2019.
44. By signing the discharge, the respondent was absolving the appellant from further liability regarding the dues.
45. The court, in this respect, finds that the learned magistrate fell in error in awarding outstanding leave of Kshs 115,071/-.

House allowance

46. The learned magistrate awarded the respondent Kshs 251,446/- on account of house allowance. The basis for the award was that the copy of the pay slip produced in court mentioned basic salary and not house or consolidated salary.
47. The respondent's contract provided for remuneration to include house allowance. The copy of the pay slip did not reflect the contractual provision.
48. Section 20 of the *Employment Act*, 2007, requires an employer to issue an itemised pay statement. The appellant did not issue a pay statement in conformity with the provision. Bank statements produced in court show the appellant was remitted inconsistent amounts to the respondent's bank account.
49. The court will give the benefit of the doubt to the respondent and not disturb this head of relief.

Salary for March and April 2019

50. The respondent was awarded Kshs 33,119/85 as outstanding salaries for March and April 2019. The learned magistrate relied on copies of bank statements produced by the respondent.
51. The appellant did not put any records to rebut or controvert the respondent's documents. The court finds the award was sound in law.
52. Before concluding, the court notes that the respondent did not appeal or cross-appeal against the judgment of the magistrate's court.



Conclusion and orders

53. Arising from the above, the court finds and holds that the learned magistrate fell into an error of law and fact by finding:
- i. That the respondent's employment had been unfairly and unlawfully terminated.
 - ii. That the respondent was retired before reaching a mandatory retirement age of 60 years.
 - iii. That the respondent was discriminated against and violated his right to fair labour practices.
 - iv. In awarding the respondent accrued leave.
54. The court further finds and holds that the learned magistrate did not fall into an error of law or fact in awarding the respondent house allowance and salary arrears for March and April 2019.
55. The appeal is allowed by setting aside the awards of compensation for unfair termination, notice pay, and compensation for discrimination.
56. The appellant has majorly succeeded, each party to bear own costs of the appeal and before the magistrates court.

DELIVERED VIRTUALLY FROM KWALE, DATED AND SIGNED IN KWALE ON THIS 19TH DAY OF OCTOBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Appellant Omondi, Abande & Co. Advocates

For Respondent Odhiambo & Associates Advocates

Court Assistant Chrispo Aura

