University of Nairobi v Otundo (Appeal E057 of 2021)
[2022] KEELRC 12893 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12893 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E057 OF 2021

CN BAARI, J

OCTOBER 13, 2022

BETWEEN

UNIVERSITY OF NAIROBI ..... APPELLANT

AND

ENOCK OTUNDO ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of KISII CMCC NO. 17 OF 2019 (Hon. E. A OBINA SPM) delivered on 24th November, 2021)

JUDGMENT

1. The appellant lodged a Memorandum of appeal dated December 16, 2021, against the judgment of Hon EA Obina delivered on November 24, 2021, in favour of the respondent for the sum of Kshs 800,000.00.

2. The respondent in his memorandum of claim dated August 22, 2016, and filed before court on August 29, 2016, sought payment of Kshs 3, 250,000/- being salary arrears together with overtime pay incurred while in the service of the appellant.

3. Aggrieved by the judgment now impugned, the appellant appealed against the judgment on the following grounds:

    i. The learned trial magistrate erred in law and in fact in granting the respondent a relief not pleaded or prayed for.

    ii. The learned trial magistrate erred in law and in fact by awarding the respondent Kshs 800,000/= for abrupt termination and disturbance when the same was not an issue for determination before court.

    iii. The learned trial magistrate erred in law and in fact by awarding a remedy not provided for in law.

iv. The learned trial magistrate erred in law and in fact by awarding the respondent Kshs 800,000/ = having held that the respondent was a part-time lecturer and that his mode of engagement cannot form a basis to lay a claim based on a contract of employment.

v. The learned trial magistrate erred in law and in fact in awarding the respondent Kshs 800,000/ = that is not only excessive but also lacked a legal basis.

vi. The learned trial magistrate erred in law and in fact in delivering a judgment that is contradictory.

4. The appellant prays that her appeal be allowed, and the judgment of Hon E A Obina delivered on November 24, 2021, be set aside with costs.

5. Parties canvassed the appeal by way of written submissions and submissions were filed for both parties.

The Appellant's Submissions

6. The appellant submits that a court can only pronounce judgment on issue arising from pleadings or issues the parties' frame for the court's determination. The appellant further submits that the trial court went ahead to determine the issue of "abrupt termination and disturbance" on its own formulation and motion that had not been raised during trial.

7. The appellant submits that a relief not founded on pleadings should not be given. They had reliance in *Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR* where the court stated thus:

> " The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

The respondent's Submissions

8. The respondent submitted that this court has a role as a first appellate court to re-evaluate, re-assess and re-analyse the extracts on record and determine whether the conclusions reached by the learned trial court are to stand or not. He called to his aid the decision in *Abok James Odera & Associates v John Patrick t/a Machira & Co Advocates [2013] eKLR*.

9. It is submitted for the respondent that the court has judicial discretion and it exercised the said discretion when it awarded compensation on the basis of the evidence tendered.

10. It is further submitted that the trial court was right in holding that the respondent was entitled to compensation for abrupt termination and disturbance. The respondent submits that the appellant stopped assigning duties to the respondent without any valid reasons and without following fair procedure.

11. The respondent submits that the trial court was right in awarding compensatory damages because there was proof that the respondent was the appellant's employee, and expected to continue teaching until a time he was to be notified that his services were no longer required. The respondent sought to rely in the decision of the Supreme court in Petition No 37 of 2018 – *Kenfreight (E.A) Limited v Benson K Nguti* to support his position.

12. It is the respondent's submission that the appellant has not demonstrated that the court proceeded on some erroneous principle or was plainly and obviously wrong in the exercise of its discretion in making

an award for abrupt termination and disturbance. He sought to rely on holding in *H Young Company (EA) Limited v Irene Wambui Wanjiru (2021) eKLR* where they quoted the case of *Gitobu Imanyara and 2 others v the Attorney General (2016) eKLR* to buttress this position.

13. The respondent submits that the trial court was justified and exercised its jurisdiction in making the award for the abrupt termination and disturbance as the respondent expected to keep working for the appellant as the contract was still in place.

Analysis and Determination

14. I have considered the appeal and the rival submissions. The grounds presented by the appellant are repetitive and can be condensed into the following two grounds:

    i. The learned trial magistrate erred in law and in fact by awarding the respondent Kshs 800,000/ = for abrupt termination and disturbance when the same was not pleaded and was not an issue for determination before trial court.

    ii. The learned trial magistrate erred in law and in fact in awarding the respondent Kshs 800,000/ = that is not only excessive but also lacked a legal basis.

15. The respondent's claim was for payment of dues in the sum of Kshs 3,250,000, interest and costs of the suit. The trial court in the now impugned judgment stated that the claimant now respondent, did not show that he submitted the exam sheets and individual mark sheets and booklets to demonstrate what units were paid for and which ones were not.

16. The Trial court concluded that the respondent had not proved his case and proceeded to dismiss the prayer for payment of arrears in its totality. In the case of *Apex Steel Limited v Dominic Mutua Muendo (2020) eKLR* quoted the case of *JSM v ENB (2015) eKLR* also cited by the respondent, the Court of Appeal stated thus;

> "We shall however bear in mind that this court will not lightly differ with the trial court on findings of fact because that court had the distinct advantage of hearing and seeing the witnesses as they testified and was therefore in a better position to assess the extent to which their evidence was credible and believable."

17. Guided by the foregoing precedent from the superior court, I find no fault in the decision of the trial court in as far prove of the claim for salary arrears is concerned.

18. The trial court in addition to dismissing the claim for salary arrears, went ahead to find that the appellant should have informed the respondent that they did not intend to allocate him more work, and on that basis awarded him Kshs 800,000 for abrupt termination, and which award is the subject of this appeal.

19. The Supreme Court addressed the issue of awards in Kenfreight (EA) Limited v Benson K Nguti [2016] eKLR in the following words:-

> "...Having keenly perused the provisions of section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The act does provide for a number of remedies for unlawful or wrongful termination under section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was

done, provided the same was challenged in a court of law, and where a court found the same to be unfair or wrongful, section 49 applies."

20. The question for this court is whether the award for abrupt termination is one available to the respondent under the *Employment Act*.

21. In my interpretation, what the trial court termed abrupt termination, is simply that the respondent was neither served with notice nor given reasons as to why he was no longer allocated work in the service of the respondent. The trial court in my view, tried to make a case of unfair termination and hence the impugned award.

22. The *Employment Act*, 2007, defines 'piece-work' as any work that an employee does and is paid according to the amount of work performed irrespective of the time occupied in its performance. Other than this definition, the act does not regulate part time employment. However, going by the *The International Labour Organization Part-Time Work Convention, 1994*, employees on part time employment are entitled to be treated in the same way full time employees are treated, including the right to procedural fairness when it comes to termination of employment.

23. In *Peterson Guto Ondieki v Kisii University (2020) eKLR* the Court cited the *Employment Act*'s protections and provisions without distinguishing the position of the employee as a part-time worker.

24. The respondent was in my opinion entitled to the rights applicable to a full-time employee, and would thus be entitled to compensation as provided for under section 49 of the *Employment Act*.

25. The appellant's second issue with the award by the trial court, is that the respondent did not make a claim for compensation and as it were, is bound by his pleadings. In *Caltex Oil (Kenya) Limited v Rono Limited [2016] eKLR* the court had these to say on pleadings:

> " The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders."

26. In *Chalicha Farmers Co-Operative Society Limited v George Odhiambo & 9 Others (1987)* the court cited with approval the case of *Gandy v Caspar Charters LTD [1956] 23 EACA, 139* where the former Court of Appeal for Eastern Africa stated thus:

> " The object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule, relief not founded on the pleadings will not be given."

27. The trial court's award on account of abrupt termination is in my view unjustified premised on the fact that no claim for compensation was pleaded. The respondent did not prove the claim for salary arrears which he pleaded, and that alone does not entitle him to an award on a matter that he did not plead. The court must guard itself against the danger of being led away by sympathy.

28. I further agree with the appellant that the award of Kshs 800,000/- lacked legal basis as the respondent did not have a defined monthly salary upon which to base a compensatory award which is limited under section 49 of the *Employment Act* to 12 months salary. It is therefore not clear how the trial court arrived at the amount awarded.

29. In sum, I find the appeal merited and is hereby allowed. The judgment of Hon E A Obina delivered on November 24, 2021, is hereby set aside in its entirety.

30. Parties shall bear their own costs.

31. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 13TH DAY OF OCTOBER, 2022.

CHRISTINE N BAARI

JUDGE

Appearance:

Mr Amkhale h/b for Mr Lutta for the appellant

Ms Moguche present for the respondent

MS Christine Omollo - Court Assistant.