Tamarind Village Limited v Sombo & another (Appeal 10 of 2020)
[2022] KEELRC 12824 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12824 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

APPEAL 10 OF 2020

AK NZEI, J

OCTOBER 6, 2022

BETWEEN

TAMARIND VILLAGE LIMITED ..... APPELLANT

AND

PETER SOMBO ..... 1ST RESPONDENT

ANDERSON FEDHEHA BUNI ..... 2ND RESPONDENT

(Being an Appel from the judgment of Honourable Lesootia A. Saitabau dated and delivered in Court on 13th February 2020 in Mombasa CM-ELR Cause No. 449 of 2018 consolidated with Cause No. 450 of 2018)

JUDGMENT

1. The appeal before me arises from the lower court's judgment delivered on February 13, 2020 in a consolidated suit, being Mombasa Chief Magistrate's Court Employment Cause No 449 of 2018 (as consolidated with cause No 450 of 2018). The claimant in Cause No 449 of 2018 was Peter Sombo (the 1st nd respondent).

   Respondent), while the claimant in Cause No 450 of 2018 was Anderson Fedheha Buni (the 2

2. The pleaded facts in the consolidated suit as pleaded in the 1st and 2nd respondents' statements of claim, both dated October 10, 2018, are similar, save for the amounts stated to have been the respondents' monthly salary at the time of termination of employment on June 11, 2018. The 1st respondent pleaded that he was earning Ksh 38,400 per month while the 2nd respondent pleaded that he was earning Ksh 40,200 per month at the time of termination of employment.

3. The respondents pleaded:-

a. that they were employed by the appellant on February 2, 2011, the 1st respondent as a saxophonist earning Ksh 38,400 per month and the 2nd respondent as a drummer earning Ksh 40,200 per month.

b. that on June 11, 2018, the appellant terminated the respondents' employment on account of redundancy without following the laid down procedure provided under section 40 of the *Employment Act 2007*.

c. that the appellant did not notify the labour officer, either in writing or at all of its decision to terminate the respondents' employment.

d. that the appellant's decision to terminate the respondents' employment on account of redundancy was done without the philosophy of law and legitimate expectation that entails holding by the appellant of genuine and transparent consultation with the affected staff prior to the issuing of termination notices.

e. that the appellant's decision to terminate the respondents' employment was one-off, knee jerk decision as there was no process followed as to the criteria of selection of employees to be declared redundant, no consideration in respect of time, skills and reliability of employees, and that there was no compliance with the principle of first in last out.

f. that the reasons advanced for termination of the respondents' employment were unjustified as the positions held by the appellants were not abolished.

g. that the appellant did not pay the respondents' dues, including pending leave days and severance pay.

h. that as a result of breach of procedure, the respondents' termination was unlawful and unfair.

i. that the respondents claimed damages for unfair termination, unpaid leave days, unpaid public holidays worked, unpaid house allowance, severance pay and overtime, all for the period 2011 to 2018. The claims were particularized at paragraph 11 of the respondents' identical memorandum of claim dated October 10, 2018.

4. The appellant defended the 1st respondent's claim vide a memorandum of response dated July 1, 2019, and stated:-

a. that the 1st respondent (Peter Sombo) was employed by the appllant as a saxophonist, working in the respondent's facility known as Tamarind Dhow.

b. that the 1st respondent was employed by the appllant with effect from January 1, 2017, earning a consolidated salary of Ksh 37,695.

c. that the 1st respondent had previously served in the same capacity under different contracts of employment which were for a fixed term.

d. that the 1st respondent's employment was ended by way of a letter of termination dated June 11, 2018, upon which the appllant paid the 1st respondent salary for three (3) days worked in June 2018, 2.5 earned leave days, one (1) public holiday worked and two (2) months' notice pay.

e. that the appllant paid the 1st respondent his terminal dues amounting to Ksh 70,561.35.

f. that the 1st respondents' salary was inclusive of house allowance, and that the 1st respondent was not entitled to house allowance as pleaded.

g. that the 1st respondent was not working over-time as the Tamarind Dhow on which he played as a saxophonist only sailed a maximum of three hours per day for a maximum of sixteen (16) trips per month, that the 1st respondent reported at 4pm for practice and worked until 10pm when the cruise would be completed, which was only six (6) hours per day.

h. that the 1st respondent was paid for all public holidays worked, and is not entitled to payment in that regard.

i. that the appllant denied the 1st respondent's entire claim.

5. The 2nd respondent's claim was defended by the appllant vide a memorandum of response dated July 2, 2019, whereby a defence similar to that set out in the foregoing paragraph (paragraph 4 of this judgment) was raised, save that regarding the 2nd respondent, the appllant pleaded:-

a. that the 2nd respondent was employed by the appllant as a drummer working at the appellant's facility known as Tamarind Dhow.

b. that the 2nd respondent was employed with effect from February 1, 2011, earning an initial salary of Ksh 25, 500; and that his employment was ended by way of a letter of termination dated June 11, 2018.

c. that the 2nd respondent's terminal dues were paid; and that the 2nd respondent was paid Ksh 94,955 made up of salary for three (3) days worked in June 2018, twenty-five (25) leave days earned, payment for two (2) public holidays worked and two (2) months' notice pay.

6. The appellant did not plead to the 2nd respondent having signed any other contract of employment apart from that commencing on February 1, 2011.

7. All the parties to the suit before the lower court (the trial court) are shown to have file their respective recorded witness statements and lists and bundles of evidential documents. They are shown to have adopted their filed witness statements as their respective testimonies at the trail and produced in evidence their respective filed documents. The respondents' recorded and filed witness statements basically replicated their pleadings.

8. Documents produced by the respondents (who were the claimants in the lower court suit) included: -

a. 1st respondent

i. an extension of contract letter dated February 15, 2012; for the period February 1, 2012 to July 31, 2012 (six months).

ii. an extension of contract letter dated July 16, 2013, for the period August 1, 2013 to December 31, 2013 (five months).

iii. termination of service letter dated June 11, 2018.

iv. payslip for the period ending June 30, 2018.

b. 2nd respondent

i. Letter of appointment dated February 2, 2011.

ii. termination of service letter dated June 11, 2018.

iii. payslip for the period ended June 30, 2018.

9. On its part, the appellant's witness, Bilah Mushuma, adopted her recorded and filed witness statement dated August 1, 2019, which basically replicated the appellant's memoranda of response referred to in paragraphs 4 & 5 of this judgment. Documents produced in evidence by the appellant included:-

    a. On the 1st respondent

        i. the 1st respondent's letter of appointment dated January 17, 2017, duly signed by the employee (the 1st respondent) on January 25, 2017. The letter (contract of employment) stated that employment was deemed to have commenced on January 1, 2017.

        ii. termination of employment letter dated June 11, 2018.

        iii. tabulation of the 1st respondent's terminal dues dated July 23, 2018.

        b. On the 2nd respondent

        i. Letter of appointment dated February 2, 2011.

        ii. termination of services letter dated June 11, 2018.

        iii. tabulation of the 2nd respondent's terminal dues dated July 23, 2018.

10. The respondents' letters of termination of service, dated June 11, 2018 are identical, and they state, in part, as follows:-

> " Re: Termination of service
>
> In view of the unprecedented drop in the level of business, the company has been compelled to take measures to reduce operational costs in order to sustain itself during these turbulent times.
>
> One of these painful decisions is the reduction of our staff complement as a necessity to give our company an opportunity to kite over this period. It is with deep regret that we have had no option but to terminate your employment with our company with effect from July 1, 2018. In view of the foregoing, your last working day will be 30th of June 2018. However, your details will be maintained in our active file and we will get in touch with you should the level of business improve.
>
> You will be paid upto and including June 30, 2018 in accordance with your terms and conditions of service..."

11. There is no indication whatsoever in the respondents' letters of termination of service that termination of employment was "on account of redundancy". I do not know how that particular term found its way into the pleadings filed by the respondents in the trial court. Indeed, the termination letters were titled "termination of service", and the same have no mention of the words "redundancy or redundant." The appellant is not shown to have undertaken any process to suggest that its intention was to declare and/or to effect redundancy regarding the respondents or any other employee. The appellant even stated in the termination letters that the appellant would get in touch with the respondents should the level of the appellant's business improve. This is not a characteristic of redundancy. *Blacks Law Dictionary* defines redundancy as:

> " A situation in which an employee is laid off from work because the employer no longer needs the employee".

12. Cross-examined during the trail, the 1st respondent testified that he signed the letter of appointment dated January 17, 2017 and that according to that contract, he was to receive a consolidated salary of Ksh 37,695. He further testified that he was in a band that entertained guest in the Dhow Restaurant which departs from the hotel at 6pm, and sails six days a week with exception of a few days. That it was not true that he worked from 6am to 6pm. That he was claiming seven (7) years leave and public holidays worked during that period. The 1st respondent denied having been paid his terminal dues as calculated by the appellant.

13. On his part, the 2nd respondent told the court that he did not proceed on leave in some years of service, and that he did not receive the sum tabulated by the appellant.

14. Upon full trial of the suit, the trial court awarded the 1st respondent a total of Ksh 1,411,518 and the 2nd respondent Ksh 1,346,906.00. The breakdown of these sums is shown in the judgment to be as follows:-

    a. 1st respondent

        i. Ksh 268,800 being payment in lieu of leave for seven years worked.

        ii. Ksh 501,120 being unpaid house allowance.

        iii. Ksh 222,720 being payment for eighty four public holidays during the seven years worked.

        iv. Ksh 155,076 being severance pay.

        v. Ksh 268,800 being the equivalent of seven months salary at the rate of Ksh 38,400 per month.

    b. 2nd respondent

        i. Kshs. 281,400 being payment in lieu of leave for seven years worked.

        ii. Ksh 434,160 being unpaid house allowance.

        iii. Ksh 187,600 being payment for public holidays during the seven years worked.

        iv. Ksh 162,346 being severance pay.

        v. Ksh 281,400 being the equivalent of seven months' salary as compensation for unfair termination of employment.

15. The respondents were also awarded costs of the suit and interest.

16. Aggrieved by the lower court's said judgment, the appellant lodged an appeal in this court vide a memorandum of appeal dated March 2, 2020, and raised 14 grounds of appeal, which I summarise as follows, and which I will determine together:-

    a. the learned magistrate erred in law and in fact in finding that the respondents had been unfairly and unlawfully declared redundant.

    b. the learned magistrate erred in law and in fact in finding that the respondents were entitled to any of the reliefs sought, and in failing to find that the respondents had not proved their case on a balance of probability.

    c. the learned magistrate erred in law and in fact in awarding the respondents leave for their entire employment period in violation of section 28 of the *Employment Act*, *2007*.

d. the learned magistrate erred in law and in fact in awarding the respondents house allowance for their entire period of employment despite clear evidence to the contrary.

e. the learned magistrate erred in law and in fact in awarding the respondents public holiday dues for their entire period of employment in contradiction to the evidence on record.

f. the learned magistrate erred in law and in fact in awarding the respondents reliefs going back over three years in violation of section 90 of the *Employment Act*, *2007*, and failing to interpret the law touching on Employment and Labour Relations properly, hence arriving at a wrong decision.

g. the learned magistrate erred in law and in fact in failing to analyse the evidence on record, thus leading to an erroneous and contradictory decision.

h. the learned magistrate erred in law and in fact in failing to consider the issues raised in the pleadings, proceedings, submissions and case law filed in court.

i. the learned magistrate erred in law and in fact in making an award which is unreasonably high and not supported by law.

17. This is a first appeal. It was stated as follows in the case of *Mursal & Another -vs- Munene (suing as the legal administrators of Dalphine Kanini Manesa)* (Cvil appeal No E20 of 2021) [2020] Kehc 282 (klr):-

> " A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty was stated in Selle & Another -vs- Associated Motor Boat Co. Ltd & Another [1968] E.a. 123 And In Peters -vs- Sunday Post Ltd [1958] E.A. page 424."

18. The lower court on the *Mursal Case* (supra) further stated:-

> " a first appellate court has jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for reviewing, both on questions of fact and law...A first appellate court is the first court of fact ordinarily and therefore a litigant is entitled to a full, fair, and independent consideration of the evidence at the appellate stage. Anything less is unjust..."

19. Upon considering the pleadings filed and evidence adduced in the trail court, the following two issues fall for determination. These are:-

a. whether termination of the respondents' employment on June 11, 2018 was unfair.

b. whether the respondents were entitled to the reliefs sought in the trial court.

20. As I preceded to state in paragraph 11 of this Judgment, the respondent's letter of termination dated June 11, 2018 did not state that termination was on account of redundancy. The letters clearly stated that termination had been necessitated by "drop in the level of the appellant's business." The question which arises is whether termination was done fairly and in accordance with the relevant provisions of

the statute. The Court of appeal held as follows in the case of *Cmc Aviation Limited -vs- Mohamed Noor* [2015] eKLR:

> "In view of the foregoing, we find that the appellant's act of summarily dismissing the respondent without giving him an opportunity to be heard amounted to unfair termination as defined under section 45 of the *Employment Act*. In Kenya Union Of Commercial Food And Allied Workers –vs- Meru North Farmers Ssacco Limited [2013] eKLR, the Industrial Court held that whatever reason or reasons that arise to cause an employer to terminate the services of an employee, the employee must be taken through the mandatory process as outlined under section 41 of the *Employment Act*. That applies in a case of termination as well as in a case that warrants summary dismissal. See also Mary Chemweno Kiptui –vs – kenya Pipeline Company Limited [2014] eKLR"

21. The appellant was not shown to have complied with the mandatory procedural requirement set out in section 41 of the *Employment Act 2007* which provides as follows:-

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, the employer shall, before terminating the employment of an employee, or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make."

22. The respondents were not shown to have been notified of the impending termination of their employment prior to their being given the termination letters dated June 11, 2018, which terminated their employment and informed them that their last working day would be June 30, 2018. They were not given an opportunity to be heard before their employment could be terminated. The reason advanced by the appellant for terminating the respondents' employment was never subjected to interrogation in a hearing involving the respondents; and its validity was never established, not even before the trial Court. It was held as follows in the case of *Walter Ogal Anuro -vs- Teachers Service Commission* [2013] eKLR:

> "...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination."

23. The Court of appeal stated as follows in the case of *Kiai Mbaki & 2 Others -vs- Gichuhi Macharia & another*[2005] eKLR:-

> "...it would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

24. I make a finding, as did the trial court though for a different reason, that termination of the respondents' employment was unfair.

25. On the second issue, and having confirmed from the payslips exhibited by the respondents for the period ending June 30, 2018 that the 1st and 2nd respondents earned gross monthly salaries of Ksh38,400 and Ksh 40,200 respectively at the time of termination of employment, I uphold the trial court's decision awarding each of the respondents the equivalent of seven months' salary in compensation for unfair termination of employment. This I have done after taking into account the circumstances in which the respondents' employment was terminated.

26. On the trial court's award to the respondents of alleged unpaid house allowance for a period of seven years, I have noted from the documents exhibited by the appellant that Peter Robert Sombo (the 1st respondent) signed a contract of employment with the appellant (dated 1January 7, 2017) on January 25, 2017. The appellant had pleaded that prior to the date of the contract dated January 17, 2017, the 1st respondent had worked under fixed term contracts. Indeed, the 1st respondent produced in evidence copies of such short-term contracts dated February 15, 2012 and 16th July 2013 respectively, hence corroborating the appellant's evidence.

27. The 1st appellant had only worked for a period of one year and six months as at June 30, 2018 when his employment was terminated. The award of seven years' unpaid house allowance was underserved, and the same is hereby set aside. Further, the 1st respondent's contract of employment dated January 17, 2017 clearly stated that his salary was consolidated. The 1st respondent's claim for house allowance thus fails under section 31(2) (a) of the *Employment Act*.

28. Similarly, I fault the trial court's award to the 2nd respondent of alleged unpaid house allowance for seven years. The second respondent's contract of employment dated February 2, 2011, which the appellant produced in evidence and which the 2nd respondent never disputed, contained the following clause:-

> " Housing: -
>
> You will be paid a house allowance of Ksh 4,500 per month."

The 2nd respondent never told the court that this particular amount was not paid together with his salary for the years he worked for the appellant. The court was not told of any dispute between the parties at any given time over non-payment of the same. This court cannot look at the payslip exhibited by the 2nd respondent to the exclusion of the employment contract signed by the 2nd respondent, and which formed the basis of his employment with the appellant. The award of house allowance made to the 2nd claimant is hereby set aside.

29. On the leave issue, the appellant did not demonstrate that the 1st respondent took any annual leave between January 1, 2017 and June 30, 2018, but nevertheless exhibited a tabulation of the 1st respondent's terminal dues indicating that the 1st respondent was entitled to Ksh 3,200 in respect of 2.5 earned leave days. The 1st respondent did not rebut this evidence, and only stated in his testimony that he had not been paid the tabulated dues. I award the 1st claimant Ksh 3,200 for accrued 2.5 leave days.

30. On his part, the 2nd respondent testified that he did not proceed on leave in some years of service. He did not, however, tell the court during which years he proceeded on leave and during which years he did not. This issue was left rather grey, and the 2nd respondent's claim for unpaid leave days during the seven years that he worked for the appellant was not proved on a balance of probability. The award made thereon by the trial court is hereby set aside. The appellant, however, exhibited in the trial court a tabulation of the 2nd respondent's dues indicating that the 2nd respondent was entitled to Ksh 33,500

in respect of 25 earned leave days. The 2nd respondent did not rebut this evidence in his testimony. I award the 2nd respondent Ksh 33,500 being payment for accrued leave days.

31. The 1st and 2nd respondents' claim regarding public holidays worked was not proved. The respondents did not give particulars of the particular public holidays worked, when and how much was payable in respect of each of such public holidays. Claims for unpaid earnings are in the nature of special damages and must be specifically pleaded and proved. The burden of proving such claims is on the employee, not the employer. The awards of Ksh 222,720 and 187,600 made by the trial court to the 1st and 2nd respondents respectively are hereby set aside.

32. The awards of severance pay, Ksh 155,076 and Ksh 162,346 made to the 1st and 2nd respondents respectively by the trail court, are hereby set aside, as termination of the respondents' employment was not on account of redundancy.

33. Ultimately, the appeal partly succeeds. The awards of Ksh 1,411,518 (1st respondent) and Ksh 1,346,906(2nd respondent) are hereby set aside, and are substituted with judgment for the 1st and 2nd respondents against the appellant for :-

    1st respondent – Peter Sombo

    a. seven months' salary being compensation for unfair termination of employment Ksh38,400x7).....Ksh 268,800

    b. payment for 2.5 accrued leave days .....Ksh 3,200

       Total Ksh 272,000

    a. 2nd respondent - Anderson Fedheha Buni

        a. Seven months' salary being compensation for unfair termination of employment

           (40,200x7).....Ksh 281,400

    b. Accrued leave days .....Ksh 33,500

       Total Ksh 314,900

34. Each party will bear its own costs of the appeal.

35. The respondents will, however, have costs of proceedings in the court below, to be assessed based on the amounts awarded in this judgment.

    Judgment accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Mr. Mbehe for appellant

Mr. Anangwe for respondents