



**Hacienda Logistics Limited v Muturi (Appeal 159 of 2021)  
[2022] KEELRC 13426 (KLR) (30 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13426 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL 159 OF 2021  
MA ONYANGO, J  
NOVEMBER 30, 2022**

**BETWEEN**

**HACIENDA LOGISTICS LIMITED ..... APPELLANT**

**AND**

**PAUL NG'ANG'A MUTURI ..... RESPONDENT**

**JUDGMENT**

1. This appeal arises from the decision of the Resident Magistrate in Milimani Commercial Court case No 662 of 2018 delivered on May 29, 2020. In the decision, the trial court held that the appellant had wrongfully terminated the contract of service of the respondent. As a result, the court ordered that the appellant pays the respondent damages in the sum of Kshs 455,000/.
2. The appellant was dissatisfied with the decision. Consequently it instituted this appeal with the request that this court reverses the trial court's finding and in place thereof enters judgment for the respondent but limited to the sum of Kshs 100,000/. In addition, the appellant prays that the respondent be condemned to pay costs of both the appeal and the lower court case. I must state at this point that I find it rather curious that whilst the appellant alleges that the trial erred in finding that the respondent was wrongfully terminated, it is nevertheless, in a sense, ready to concede that the respondent is entitled to be paid Kshs 100,000/ on account of the alleged cause of action.

**Facts of the Case and the Trial Court's Finding**

3. From the record, the respondent was employed as a driver. Whilst it is the respondent's case that he was employed by the appellant, the appellant avers that the respondent was hired by another company, Keyfreight Ltd, but seconded to serve the appellant whenever he had time. Nevertheless, the appellant concedes that it used to pay the respondent's salary.
4. It does appear that at some point in time around March 21, 2018, the respondent's services were terminated. Whilst the circumstances of the termination are contested, it is agreed by both parties that



the respondent's contract came to a close on this date. According to the respondent, the termination was occasioned either due to outright termination without observing the requirements of section 41 of the Employment Act or due to irregular declaration of redundancy.

5. Whilst not denying the fact of termination of the respondent, it is the appellant's case that the respondent was terminated by Keyfreight (K) Ltd, the company that allegedly seconded him to the appellant. According to the appellant, this development was occasioned by a breakdown of the vehicle the respondent was hired to drive. With the vehicle broken down, there was no vehicle for the respondent to drive necessitating the end of his employment.
6. After hearing the parties, the court reached the conclusion that the appellant assumed the position of the respondent's employer when it took over the responsibility of paying his salary. The court also found that the appellant did not follow the procedure laid down in the *Employment Act* in terminating the respondent. As a result, the appellant's decision was declared unlawful and the respondent awarded damages as more particularly set out in the decision.

### **The Case on Appeal**

7. Dissatisfied with the decision, the appellant has filed the current appeal. In the memorandum of appeal dated June 22, 2020, the appellant raises 11 grounds of appeal. The grounds raise the following three issues for determination:
  - a. Whether there was sufficient evidence placed before the trial magistrate to support his finding that the respondent was in the employment of the appellant and that he was unfairly terminated.
  - b. Whether the trial magistrate failed to take into account the principles under the *Employment Act* in his analysis of the issues regarding liability of the appellant and the quantum of damages in the cause.
  - c. Whether the decision by the trial court was influenced by extraneous factor.
8. This is a first appeal. Consequently, it is to proceed by way of a retrial. The court is to re-evaluate the evidence on record and arrive at its own conclusion on the matter. However, as the court did not hear the witnesses, it must make allowance for this.
9. I will address the three issues not necessarily in a distinct manner. However, at the end of the analysis, all the issues shall have been determined either expressly or by implication.
10. On the first issue, the respondent produced several pay slips all of which demonstrate that the appellant had an employer-employee relationship with the respondent. As a matter of fact, the pay slips show that the appellant had assigned the respondent staff number HA010.
11. Besides the aforesaid, there was a National Hospital Insurance Fund printout produced in evidence which shows that the respondent had been registered as an employee of the appellant. With all this evidence on record, it is inconceivable that the appellant would hold the view that the trial magistrate's decision that the parties had an employer-employee relation was unfounded.
12. The appellant argues that it had outsourced the respondent together with the truck that he was driving from Keyfreight Ltd. Yet no iota of evidence outside the general statements by the managing director of the appellant was presented to prove this fact. The trial court was not expected to overlook the documents evidencing the fact that the appellant had employed the respondent merely on the basis of such general statements by the appellant.



13. Regarding whether the termination of the respondent's contract of employment was justified in law, the trial court noted that the appellant did not deny that the respondent had been terminated. The appellant's case before the trial court was that the respondent was terminated by Keyfreight Ltd, an entity other than the appellant. Yet again, the appellant did not present any evidence to support this assertion.
14. The trial magistrate having found that the respondent was an employee of the appellant, it was correct for him to reach the conclusion that only the appellant could have terminated the respondent. The only other question that the trial court was to consider in the circumstances was whether the said termination was lawfully executed.
15. Having examined the evidence presented before him, the trial magistrate found that the appellant failed to observe the guidelines under section 41 of the *Employment Act* in relation to due process whilst terminating the respondent. I have looked at the evidence on record and find no reason to fault the trial court's finding in this respect.
16. There is no evidence that the appellant ever notified the respondent about the reason that necessitated his termination. There is no evidence that the respondent was given an opportunity to defend himself against any charge by the appellant. Even if the breakdown of the vehicle the respondent was driving was the reason for the separation, this ought to have been raised in a disciplinary cause under section 41 of the *Employment Act*. And if it is the appellant's case that the alleged vehicle breakdown resulted in the respondent's work being obliterated, then the appellant ought to have followed the procedure under section 40 of the *Employment Act* to release the respondent. The record does not show that either of the above procedures of termination was followed. In the face of these glaring anomalies in the process leading to the respondent's termination, it is surprising that the appellant would suggest that the decision to terminate the respondent was nevertheless correct.
17. On the compensation ordered, I do not think that it was open to the trial court to award the respondent damages under section 49 of the *Employment Act* and still award him severance pay under section 40 of the *Employment Act*. Severance pay under section 40 presupposes that there has been a valid declaration of redundancy. Once a decision is reached that the employee's termination was unlawful, the court, in my respectful view, can only award damages under section 49 of the *Employment Act*. As a result, I find that the award of Kshs 50,000/ to the respondent to cover severance pay for two years was without basis. The same is set aside in its entirety.
18. There was also no evidence tendered by the respondent that he did not take his annual leave during the period he was in the employment of the respondent. Consequently, the award of Kshs 35,000/ to cover leave pay is set aside for want of proof.
19. According to the respondent's bank statement presented in evidence, the appellant deposited a sum of Kshs 5,000/ on February 15, 2018 and Kshs 9,300/ on March 8, 2018. The respondent states that these amounts were paid towards his salary for February and March 2018 after some deductions by the employer. From the pay slips tendered in evidence, the respondent's monthly salary was Kshs 25,000/.
20. When asked about the deductions, the appellant's witness could not explain why they were made. Part IV of the *Employment Act* forbids an employer from making unexplained deductions from an employee's salary. Having regard to the provisions of law aforesaid and the fact of the unexplained deductions from the respondent's salary in February and March 2018, I find that the trial court was right to require that the appellant reimburses the respondent the sum of Kshs 15,000/ as pleaded.
21. Section 35 of the *Employment Act* requires the employer to issue an employee with notice to terminate in the event a decision is reached that the parties separate. The notice period is determined by the



duration the employee has to serve for him to be entitled to salary. In the respondent's case, this period was one month. He was therefore entitled to a termination notice of one month or salary in lieu thereof.

22. There is no evidence that the appellant issued the respondent with notice to terminate his contract of service under section 35 of the *Employment Act*. Consequently, the trial court was right to require the appellant to pay the respondent the sum of Kshs 25,000/ being equivalent to his salary for one month.
23. On whether the trial court was right to award the respondent compensation equivalent to his salary for twelve (12) months, the law is now settled that whilst a trial court is entitled to make this maximum award, it must nevertheless justify it in terms of the principles set out under section 49 of the *Employment Act*. In the *Ol Pejeta Ranching Limited v David Wanjau Muboro* [2017] eKLR case, the Court of Appeal said this of the above requirement:-

“The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations.....”

24. I have studied the learned trial magistrate's decision and do not see where he made reference to the principles that guide the assessment of compensation under the aforesaid section of law. I note that prior to his termination, the respondent had served the appellant for approximately two (2) years. This was not a long duration. I however take cognizance of the fact that there was no cogent evidence to demonstrate that respondent's conduct contributed to his termination.
25. Having regard to these factors and the general difficulty to secure employment in Kenya, I think that an award of compensation that is equivalent to the respondent's monthly salary for eight (8) months would have been fair compensation to him. Accordingly, I set aside the award of Kshs 300,000/ as compensation for unlawful termination and in place thereof enter judgment for this head of damages in the sum of Kshs 200,000/.

### **Determination**

26. The appellant's appeal is dismissed save for the partial variations as here below:-
  - a. The award of severance pay to the respondent is hereby set aside.
  - b. The award of leave pay is set aside for want of proof.
  - c. The award of salary arrears of Kshs 15,000/ is upheld.
  - d. The award of salary in lieu of notice of Kshs 25,000/ is upheld.
  - e. The award of compensation is revised downwards to Kshs 200,000/.
  - f. The amounts aforesaid to be subject to the applicable statutory deductions under section 49 of the *Employment Act*.
  - g. The respondent to be paid costs of the proceedings before the trial magistrate.
  - h. Each party to bear his/its own costs on this appeal as both have partially succeeded.



- i. The appellant to issue the respondent with a certificate of service.

**DATED AND SIGNED ON THE 30<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**MAUREEN ONYANGO**

**JUDGE**

**DELIVERED ON THE 2<sup>ND</sup> DAY OF DECEMBER, 2022.**

**B O M MANANI**

**JUDGE**

