



REPUBLIC OF KENYA



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**Kamili Packers Limited v John (Civil Appeal 5 of 2020)
[2022] KEELRC 13453 (KLR) (8 December 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13453 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL 5 OF 2020
MN NDUMA, J
DECEMBER 8, 2022**

BETWEEN

KAMILI PACKERS LIMITED APPELLANT

AND

THOMAS WANJALA JOHN RESPONDENT

*(Being an Appeal from the Judgment of the Honourable D.O. Mbeja (SRM)
delivered on 27th January, 2020 in Milimani CMEL No. 137 of 2019)*

JUDGMENT

1. The appellant dissatisfied with the judgment of Hon DO Mbeja (Senior Resident Magistrate) delivered on January 27, 2020 lodged this appeal on four (4) grounds to wit:-
 1. The learned magistrate erred in law and in fact in failing to consider the appellant's defence and especially the fact that the respondent had participated in an illegal strike.
 2. The learned magistrate erred in law in improperly exercising his discretion in awarding the respondent a sum of *Kshs* 409,368.
 3. The learned magistrate erred in law and in fact in awarding the respondent awards under the heads of salary in lieu of notice, unpaid salary, leave days accrued, severance pay, and unlawful deductions from salary without any evidence having been tendered by the respondent to prove the claims.
 4. The learned magistrate erred in law and in failing to properly analyse the claims made by the respondent.
2. The facts of the case are that the respondent was employed by the respondent on June 3, 2003 as a general worker and was later promoted to a machine operator having a monthly salary of *Kshs* 17,004. The employment of the respondent was terminated on January 3, 2019.



3. The issues for determination before the trial court were whether the termination of employment of the claimant was for a valid reason and whether the respondent followed a fair procedure in terminating the employment of the claimant. The court also had to determine what reliefs if any were available to the respondent.
3. Guided by the court of appeal decision in *Selle v Associated Motor Boat Company Limited [1968] EA 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.”
4. The court proceeds to evaluate the evidence adduced before the trial court to determine if there is any factual and or legal justification to upset the decision of the trial court.
5. PW1, the respondent herein told the court that he worked for the respondent until January 3, 2018. That he was not given any notice or explanation for the termination. That he was not granted leave, and claimed leave for 9 months. The respondent stated that he was not involved in any strike as was alleged by the appellant. That he was given a three (3) months contract to sign but he declined. That he was paid salary through the bank. Under cross-examination, PW1 stated that he was employed on permanent basis but the appellant intended to introduce three (3) months contracts which the respondent refused to sign. PW1 stated that they never went on leave nor were they paid in lieu of leave. PW1 reiterated under cross-examination that he did not go on strike on the 1st and January 2, 2019 and was on duty. PW1 stated that he served during holidays and that he was deducted a sum of Kshs 17,004 which he claimed. PW1 testified that he worked for the respondent for a period of nine years. PW1 stated that he was not given any letter of appointment nor any letter of termination.
6. DW1, Antony Ndambuki testified for the appellant. He said he was an Administrative Assistant and that PW1 worked as a Machine Operator. DW1 testified that PW1 engaged in an illegal strike and he was summarily dismissed for that reason. DW1 stated under cross-examination that the respondent was served with a letter of dismissal. DW1 stated that PW1 was not paid his terminal dues. DW1 stated that PW1 worked from the year 2014 to 2018.
7. In his judgment, the trial magistrate came to the conclusion upon considering the evidence adduced by PW1 and that adduced by DW1 that the appellant failed to observe the provisions of section 41 of the *Employment Act*, 2007. The court was satisfied that the PW1 was not given notice of termination; a hearing before termination and was not allowed a representative of choice at an hearing before his employment was terminated. The trial court relied on the decision of ELRC in *Alphonse Maghanga Mwachanya v Operation 680 (Limited) (2013) (eKLR)* to find that the appellant did not follow fair procedure to establish that it had a valid reason to terminate the employment of the respondent. The court found, and we agree with the finding by the trial court that the appellant did not adduce any cogent evidence through DW1 that the respondent had participated in unlawful strike.
8. Despite PW1 stating that he was not served with a letter of termination, the trial court considered the letter of termination produced by DW1 dated January 2, 2019, but found that the termination was not preceded by a fair procedure.



9. The court having considered the testimony by PW1 and DW1 concluded that the respondent had satisfied the court that the termination of his employment was unlawful and unfair.
10. This court does not find that the learned trial magistrate misdirected himself and or failed to consider material factors in arriving at the conclusion he did.
11. The court finds no reason to vary and or set aside the decision of the trial court in this respect. This court therefore concludes that the summary dismissal of the respondent was not for a valid reason and the appellant did not follow a fair procedure in summarily dismissing the respondent. The appellant therefore violated sections 36, 41, 43 and 45 of the Employment Act, in this regard.

Remedies

12. The court confirms the finding by the trial magistrate, that the respondent had prayed for payment of one (1) month salary in lieu of notice in the sum of Kshs 17,004 and had adduced evidence to prove the claim.
13. Equally, the respondent had pleaded for payment and proved he was owed arrear salary for two (2) worked days in January, 2019 in the sum of Kshs 1,308; did not go on leave in the year 2018 and was owed Kshs 17,004 in lieu of leave days not taken for the whole year.
14. There is also unrebutted evidence that the respondent had wrongfully deducted Kshs 17,004 from the salary of the respondent. The trial court correctly awarded this amount.
15. This court has not found any tangible evidence that the respondent was entitled to payment of gratuity or severance pay. There is no evidence on record to satisfy the requirements of either section 35(5) & (6) and or section 40 of the Employment Act, to entitle the respondent to the award of severance and/or service pay as prayed for by the respondent. It is opportune to note that severance pay and service pay are two distinct reliefs under the Employment Act or contract of service and either or both of them must be specifically proved by he who claims to be paid. The respondent in this matter did not discharge that onus. The award of Kshs 53,000 in respect of severance and/or service pay is therefore set aside.

Compensation

16. The trial court awarded the respondent the equivalent of 12 months' salary in the sum of Kshs 2,040,48 being the maximum compensation payable to a dismissed employee under section 49(1) of the Employment Act, 2007.
17. The trial court did not invoke the mandatory considerations under subsection 49(4) in justifying the maximum award of the equivalent of 12 months' salary. In this respect, the court finds that the claimant had served the respondent from 2009 up to 2018, a period of about nine (9) years. The respondent was summarily dismissed without payment of terminal benefits wrongly. The respondent suffered loss and damage. This court finds that no contribution to the dismissal by the respondent was established. The respondent lost prospect of career progression and source of income. The summary dismissal appears to have been actuated by refusal by the respondent to sign a short term contract that would have violated his accrued rights under the Employment Act, 2007. This is the conduct the court frowns upon and same constitute unfair labour practice in violation of article 41 of the Constitution of Kenya, 2010.
18. The court has considered the case of Ol Pejeta Ranching Limited v David Wanjau Muboro [2017] eKLR and all factors above and reduced the compensation awarded to the respondent to the equivalent of nine (9) months' salary in the sum of Kshs 153,036.



19. In the final analysis, this court sets aside the judgment of the trial court and enters judgment in favour of the respondent as against the appellant as follows:-

- (a) Kshs 153,036 in compensation
- (b) 17,004 - notice pay.
- (c) 1,304 being arrear salary.
- (d) 17,004 being unpaid leave for 2018.
- (e) Kshs 17,004 being refund of deducted salary.
Total award Kshs 205,352.
- (f) Interest at court rates from the date of judgment at the trial court, till payment in full.
- (g) Costs of the suit in the trial court and this court.

DATED AND DELIVERED AT NAIROBI (VIRTUALLY) THIS 8TH DAY OF DECEMBER, 2022.

MATHEWS N NDUMA

Judge

Appearances

Mr Mureithi for appellant

M/s Kang'ethe for respondent

Ekale – court Assistant

