



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 18 OF 2019

JUBILEE JUMBO HARDWARE LTD.....APPELLANT

v

ROGACIANA RADING OGWANG.....RESPONDENT

(An Appeal from the judgment of Hon. Ondieki (Principal Magistrate) in Chief Magistrates Court at Kisumu Employment Cause No. 35 of 2019 delivered on 15 October 2019)

JUDGMENT

1. Rogaciana Rading Ogwang (the Respondent) instituted legal proceedings against Jubilee Jumbo Hardware Ltd (the Appellant) before the Kisumu Magistrates Courts on 28 March 2019 alleging unfair termination of employment and breach of contract.
2. In a Judgment delivered on 15 October 2019, the trial Court found that the termination of the Respondent's employment was unfair.
3. The Respondent was awarded
 - (i) Damages Kshs 360,000/-
 - (ii) Unpaid house allowance Kshs 36,000/-
4. The Appellant was aggrieved and it filed a Memorandum of Appeal on 30 October 2019 contending
 1. The Learned Magistrate erred in both law and fact in failing to find that the salary as per contract was a consolidated salary thereby arriving at a wrong decision in awarding the house allowance.
 2. The learned trial Magistrate erred in both fact and law in failing to find that at the termination of the employment of the employee, the Respondent herein was compensated a sum of Kshs 43,744/-, a sum which was not considered in totally (sic) of the award.
 3. The learned trial magistrate erred in both law and fact in failing to consider that during the trial, the employee the Respondent (sic) confirmed that indeed there was a meeting and actually a hearing was held before termination.
 4. The learned trial Magistrate erred in law and fact in making a finding that the termination was unfair contrary to the evidence on record showing otherwise thereby arriving at a wrong conclusion.
 5. The learned trial Magistrate erred in law and fact in arriving (sic) in failing to consider that the employee the Respondent herein was still on probation, therefore, was not subjected to the relevant provision regulating the relationship between the employer and the workers under probation.
5. The Record of Appeal was filed on 12 October 2020 and the Court gave directions on 4 December 2020.
6. The Appellant's submissions were filed on 11 November 2020 while the Respondents submissions were filed on 21 January 2021 (should have been filed and served before 11 December 2020).
7. The delivery of the judgment was rescheduled because of the failure by the Respondent to file submissions within agreed timelines.
8. The Court has considered the record and the submissions.

Role of the Court on the first appeal

The Court of Appeal in *Selle and Ar v Associated Motor Boat Co. Ltd & Ors (1968) EA 123* stated the role of Court on the first appeal thus

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 neither 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 had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

9. This Court will bear in mind the interdict on its role.

Probation

10. The Appellant contended that the Respondent left employment during probation and therefore the question of hearing and due process did not arise.

11. Although paragraph 5 of the letter of appointment provided that the contract could be terminated by 7-days' notice during probation, the contract did not outline the length of the probationary period.

12. It, therefore, could not be that the contract was subject to a probationary period.

House allowance

13. Section 31 of the Employment Act, 2007 obligates the employer at the first instance to provide housing to its employees. Where the employer cannot provide housing, it should pay the employee an allowance to cover housing.

14. The requirement to provide housing and/or housing allowance however does not apply where there is a proviso in the contract that the remuneration is consolidated or where a collective bargaining agreement provides for consolidation of wages.

15. The contract issued to the Respondent was effective from 3 April 2018. It stated that the remuneration was *basic consolidated* pay.

16. A copy of the Respondent's payslip for October 2018 was produced. It indicated that the Respondent was receiving a basic salary of Kshs 30,000/-. The gross salary was also indicated as Kshs 30,000/-.

17. The Court has looked at the copy of payslip. The words *consolidated* are not used therein. The basic pay is indicated as Kshs 30,000/-. The gross pay is also indicated as Kshs 30,000/-.

18. Both the contract and copy of payslip were vague as to whether the salary paid to the Respondent was consolidated or not because of the use of the term *basic*.

19. Housing and/or house allowance forms one of the fundamental or basic terms of employment under the Employment Act, 2007 (see preamble and section 26 of the Employment Act, 2007). It belongs to the normative value of fair labour practices.

20. It is the contract which should have outlined the entitlement to housing and/or house allowance It did not and the Court has only a vague contract.

21. Article 20(2)(b) of the Constitution calls upon the Court to adopt an interpretation that most favours the enforcement or enjoyment of a fundamental right.

22. Due to the vagueness, the Court is of the view that the salary of Kshs 30,000/- did not include a housing allowance.

23. The trial Court therefore did not fall into an error in awarding house allowance.

Unfair termination of employment

24. For termination of employment to pass legal muster, there must be evidence of procedural compliance and substantive justification.

25. Section 35(1)(c) of the Employment Act, 2007 envisages written notice. The Appellant did not demonstrate that it issued a written notice.

26. However, in cases of summary dismissal, the written notice may not be applicable. The termination of employment letter sent to the Respondent suggests that it was a summary dismissal (it was with immediate effect).

27. In terms of section 41(2) of the Employment Act, 2007, an employer must conduct an oral hearing in cases of summary dismissal. A

representative or colleague of the employee should be present.

28. The Appellant's evidence was that the Respondent left employment on his own volition. That testimony was inconsistent with the Appellant's own records. The Appellant issued a letter dated 7 November 2018 informing the Respondent of the termination of his contract.

29. There was vague evidence that the Respondent attended a meeting with the Director. The Director was not called to testify. It is not clear whether the meeting was an investigative one to establish the facts or a disciplinary hearing as contemplated by the law.

30. Further, the Appellant's witness stated that the Respondent became unruly after the meeting and stopped reporting to work. The letter of termination of employment made no reference to a disciplinary hearing.

31. On the validity and fairness of the reasons for the termination of employment, it was incumbent upon the Appellant to discharge the burden placed on employers by sections 43 and 45 of the Employment Act.

32. The Appellant's witness did not testify on the particulars of the unruly behaviour on the part of the Respondent and if the Respondent failed to report to work without permission or lawful cause, he should have been subjected to a disciplinary hearing starting with a show-cause to explain the absence from work. No such show-cause was issued.

33. The Appellant did not discharge the burden of proving due process or justifiable reasons to terminate the Respondent's contract.

Payment of dues of Kshs 43,744/-

34. The Respondent acknowledged payment of Kshs 43,744/0 being terminal dues. The Appellant's witness stated that this comprised earned wages, pay in lieu of notice and accrued leave.

35. The Respondent did not seek and the trial Court did not award these heads of dues.

Conclusion and Orders

36. The Court finds no error of law or fact on the part of the trial Court.

37. The Appeal is dismissed with costs.

38. The decretal sum to attract interest at court rates from today till payment in full.

Delivered through Microsoft teams, dated and signed in Kisumu on this 26th day of January 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Owiti Mwallo Odhiambo & Associates

For Respondent Hussein B. Indimuli Advocate

Court Assistant Chrispo Aura