



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL NO. 19 OF 2019

JUBILEE JUMBO HARDWARE LTD.....APPELLANT

VERSUS

ERICK OTIENO OKWANY.....RESPONDENT

(An Appeal against the Judgment of Hon. Ondieki (Principal Magistrate) in Chief Magistrates Court at Kisumu Employment Cause No. 36 of 2019 delivered on 15 October 2019)

BETWEEN

ERIC OTIENO OKWANY.....CLAIMANT

VERSUS

JUBILEE JUMBO HARDWARE LTD.....RESPONDENT

JUDGMENT

1. Eric Otieno Okwany (Respondent) sued Jubilee Jumbo Hardware Ltd (Appellant) before the Chief Magistrates Court on 28 February 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 for wrongful dismissal Kshs 432,000/-.
 - (ii) Unpaid house allowance Kshs 232,200/-.
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 94,704/- , 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 Record of Appeal was filed on 24 November 2020 and the Court gave directions on 1 December 2020.
6. The Appellant had filed its submissions on 25 November while the Respondent's submissions were not on record by the agreed timeline of 18 December 2020.

7. The Court has considered the record and submissions.

Role of the Court on the first appeal

8. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

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

House allowance

10. 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.

11. 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.

12. The contract issued to the Respondent and dated 1 April 2015 was silent on the provision of housing or payment of a housing allowance.

13. Despite the silence, the Appellant made reference to the Respondent's payslip for October 2018 to assert that the wage paid to the Respondent was consolidated and therefore met the requirements of section 31(1) & (2) of the Employment Act, 2007.

14. The Court has looked at the copy of payslip. The words consolidated are not used therein. The basic pay is indicated as Kshs 36,000/-. The gross pay is also indicated as Kshs 36,000/-.

15. The assertion by the Appellant that the wage was consolidated is therefore not supported by evidence. The provision on consolidation should have been made in the contract and not left to inference.

Unfair termination of employment

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

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

18. 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.

19. In terms of section 41(2) of the Employment Act, 2007, it is mandatory for an employer to conduct an oral hearing in cases of summary dismissal. A representative or colleague of the employee should be present.

20. 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.

21. It is also notable that the letter of termination of employment made no reference to a disciplinary hearing.

22. Further, the Appellant's witness stated that the Respondent became unruly after the meeting and stopped reporting to work.

23. If this testimony was to be given weight, then it should have been supported by a *show-cause* to explain the failure to report to work or an ultimatum to report to work or risk disciplinary action, for the failure to report to work constituted a distinct disciplinary offence. No such evidence was placed before the Court.

24. 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.

25. The Appellant's witness did not testify on the particulars of the unruly behaviour on the part of the Respondent but to the contrary issued a To Whom It May Concern letter to the Respondent describing him as being of good conduct and industrious.

26. The Appellant did not discharge the burden expected of it during the trial.

Payment of dues of Kshs 94,704/-

27. The Respondent acknowledged payment of Kshs 94,704/0 being terminal dues. The dues could not have included house allowance as the position of the Appellant was that the remuneration was consolidated.

28. The dues could also not have included compensation for unfair termination of employment.

29. In any case, the Appellant did not give a breakdown of the Kshs 94,704/-.

Conclusion and Orders

30. From the foregoing, the Court finds no error of law or fact on the part of the trial Court.

31. The Appeal is dismissed with costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 20th 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