



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 13(A) OF 2020

KENATCO TAXIS LIMITED.....APPELLANT

VERSUS

EVANS ADEKHERA LIUVA.....RESPONDENT

(Appeal from the judgment of Hon M.L Nabibya, PM delivered on 30th April 2020 in Mombasa CMELRC No 204 of 2018)

JUDGMENT

1. The Respondent's claim in the lower court was for notice and service pay, compensation for unfair termination of employment, plus costs and interest.
2. The matter at trial was heard by **Hon Kassam, SRM** but judgment was rendered by **Hon M.L Nabibya, PM**, who on 30th April 2020, found in favour of the Respondent in the following terms:
 - a) One month's salary in lieu of notice.....Kshs. 15,919.90
 - b) Service pay for 10 years.....79,599.50
 - c) 12 months' salary in compensation.....191,038.80
 - d) Costs and interest.
3. Being dissatisfied with the judgment of the trial court, the Appellant filed the present appeal.
4. In its Memorandum of Appeal dated 8th June 2020, the Appellant raises the following grounds of appeal:
 - a) That having taken over the matter after close of the respective parties' cases, the Honourable Magistrate erred in law in failing to properly appreciate and analyse the evidence that was presented before the judicial officer previously handling the matter;
 - b) That the Honourable Magistrate made an error both in law and fact in making a determination that the termination of the Respondent did not follow the correct procedure hence was unfair/unlawful;
 - c) That the Honourable Magistrate erred in law in awarding the Respondent 12 months' salary as compensation for unfair termination when no basis had been laid for the same;
 - d) That the Honourable Magistrate erred in law in awarding the Respondent service pay in disregard of the clear provisions of Section 35(6)(d) of the Employment Act;
 - e) That the Honourable Magistrate failed to appreciate and or apply the principles of employment law as regards the case at hand and came to a wrong conclusion, not backed by law and facts pertaining to the matter at trial.
5. This is a first appeal and I am therefore required to reconsider and re-evaluate the evidence, and giving allowance to the fact that I have not encountered the witnesses first hand, draw my own conclusions.
6. In this regard, I am guided by the decision by the Court of Appeal in **Selle v Associated Motor Boat Company Ltd [1968] E.A 123** where it was held:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, 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 or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

7. The Appellant is engaged in the taxi business. The Respondent was employed as a driver in March 2008 and rose through the ranks to the position of Station Controller as at 1st December 2016. At the material time, the Respondent was stationed at Moi International Airport, Mombasa.

8. On the morning of 9th April 2018, a Kenya Airways flight landed at Moi International Airport, Mombasa. On board was a lady who, upon exiting the arrival terminal, approached the Respondent and requested for a taxi. After some encounter, the lady left the Airport by a taxi driven by a third party driver.

9. It turned out that the lady passenger was the Appellant’s Customer Relations Manager, Patricia Wairimu Muchangi, who later reported that the Respondent had diverted business from the Appellant, by directing her to a taxi operated by a third party driver.

10. Muchangi escalated the matter to the Human Resource Manager who advised her to notify the Branch Manager. This is what triggered the disciplinary process that eventually led to the termination of the Respondent’s employment.

11. The third party driver who ferried Muchangi from the Airport was Martin Muthati, who testified for the Respondent as CW1; he denied having been connected to Muchangi by the Respondent. This too was the Respondent’s line of testimony.

12. The Appellant raises five (5) grounds of appeal which I will consider under the following three (3) heads:

- a) Reason for and process of termination;
- b) Level of compensatory award;
- c) Award of service pay.

13. While addressing the issue of the legality of the termination of the Respondent’s employment, **Hon. Nabibya, PM** stated:

“RW1 was the complainant; however, she failed to participate at the disciplinary meeting against claimant though it was on the basis of her report that a job was lost.....

...the claimant faced a panel without the complainant, he was therefore not given an opportunity to cross examine his accuser and it was faulty for a decision to be arrived at without listening to both parties together.”

14. In its written submissions filed in court on 15th January 2021, the Appellant suggests that the learned Magistrate erred by faulting the disciplinary process on the ground that RW1 did not appear at the disciplinary proceedings. The Appellant submits that the Respondent was all along aware of the charge he was facing and he did not complain about the disciplinary process.

15. I respectfully disagree. The essence of the procedural fairness requirements under Section 41 of the Employment Act is that an employee facing disciplinary action is given an opportunity to test the veracity of the accusations made against them at the shop floor. This requirement does not diminish merely because the employee does not raise an objection in the course of the disciplinary proceedings.

16. According to the evidence on record, the charge that the Respondent diverted business from the Appellant to a third party originated from a complaint made by RW1. It is on record that apart from RW1, who was the customer in issue, the only other persons who witnessed the events of 9th April 2018, were the Respondent and the third party driver.

17. The account given by RW1 as to the actual happenings on the material day was diametrically different from the one given by the Respondent and the third party driver. How then could the disciplinary panel arrive at a fair decision without the testimony of RW1? If RW1 was procured to attend the trial, why was she not invited to the disciplinary proceedings? In light of the conflicting accounts as to what had transpired on 9th April 2018, Muchangi’s attendance at the disciplinary proceedings was required and her exclusion was fatal to the Appellant’s case.

18. I therefore agree with the learned Magistrate that the disciplinary process as conducted at the shop floor did not establish a valid reason for terminating the Respondent’s employment, as required by law.

19. Upon finding that the termination of the Respondent’s employment was unlawful and unfair, the trial court awarded him the maximum award of 12 months’ salary in compensation. This is one of the awards allowed under Section 49 of the Employment Act.

20. In its decision in ***Kenfreight (E.A) Limited v Benson K Nguti [2019] eKLR*** the Supreme Court of Kenya affirmed that in making an award under Section 49 of the Employment Act, the court exercises judicial discretion on what is fair and just in the circumstances of each case.

21. Regarding an appeal that questions the exercise of discretion by a trial court, the guiding principle is that the appellate court will not interfere unless it is shown that the trial court failed to direct itself properly in law and fact, taking all relevant considerations into account (see *Printing Industries Limited & another v Bank of Baroda [2017] eKLR*).

22. The Respondent was a long serving employee of the Appellant and there was no evidence of any previous disciplinary issues against him. Having declared the termination unlawful and unfair, the trial court was justified in awarding him 12 months' salary in compensation. This award is therefore confirmed. The award for 1 month's salary in lieu of notice is also confirmed.

23. With respect to the award for service pay, I have this to say; Section 35(6)(d) of the Employment Act excludes employees who are contributing members of the National Social Security Fund (NSSF) from laying a claim for service pay. In the absence of evidence that the Appellant failed to remit the Respondent's NSSF dues, there was no basis upon which the trial court could allow the claim for service pay.

24. In the end, this appeal succeeds only to the extent that the award for service pay is set aside.

25. The Appellant will pay 75% of the costs of this appeal and those in the court below.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 4TH DAY OF MARCH 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in 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.

LINNET NDOLO

JUDGE

Appearance:

Mr. Adalla for the Appellant

Mrs. Kyalo for the Respondent