



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**APPEAL NO. 29 OF 2020**

**JOHN NGARI NJIRU.....APPELLANT**

**VERSUS**

**SECURKENYA GROUP LIMITED.....1<sup>ST</sup> RESPONDENT**

**BENJAMIN MOSSAS.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The appeal arises from a judgment of Chief Magistrate **Peter Ngare Gesora** of Milimani Commercial Court delivered on 7/4/2020 in **CMEL 288 of 2018**.

2. The Appeal is premised on grounds 1 to 8 set out in the Memorandum of Appeal dated 5<sup>th</sup> October, 2020.

3. The appellant prays that the appeal be allowed and the judgment be set aside and the matter be determined in favour of the appellant for wrongful dismissal and defendant's failure to pay for injury suffered by the Appellant under Work Injury Benefits Act (WIBA).

4. That the Court grants the Appellant the reliefs set out in the Memorandum of Appeal comprising:-

(i) One month's salary in lieu of notice.

(ii) Compensation for wrongful dismissal.

(iii) Compensation for public holiday and weekends worked without payment of overtime.

(iv) Special damages.

(v) Compensation for injury under **Work Injury Benefits Act (WIBA)** as calculated by the **Ministry of Labour office Nairobi in the sum of Kshs 538,388 and**

(vi) Costs of the suit below and the Appeal.

5. *The grounds of appeal are as follows:-*

1. **THAT** the learned trial Magistrate erred in law when he failed to deal effectively and fairly with all the issues raised in the application before him, in particular plaintiff's claim under Work Injury Benefit Act (**WIBA**) and other relevant matters raised under employment Act.

2. **THAT** the learned Magistrate erred in law and fact in falling to take into consideration crucial evidence in favour of the appellant.

3. **THAT** the learned Magistrate erred in law by delivering a judgment that does not meet the legal threshold.

4. **THAT** the learned trial Magistrate erred in law and in fact when in reaching his decision he engaged in conjecture and speculation thereby basing his decision on erroneous assumptions not supported by the evidence on record.

5. **THAT** the learned trial magistrate erred in law and fact when he failed to address the overtime, weekends and public holidays I had worked and not paid for as I had indicated in my amended memorandum of claim and the relevant compensations therein.

6. **THAT** the learned trial Magistrate erred in law and fact in disregarding the evidence of the appellant on record, final submissions and in amended memorandum of claim hence resulting to a wrong decision.

7. **THAT** the learned Magistrate erred in law and fact for failing to award the appellant the general damages and special damages as pleaded in the plaint and proved to the required standards in law.

8. **THAT** the learned trial Magistrate's decision albeit, a discretionary one was plainly wrong, even without an advocate I deserved a lawful judgment like any other litigant.

6. In the case of **Selle and Another –vs- Associated Motor Boat Company Limited and Others [1968] E.A. 128** *Sir Clement De lestant* stated:-

**“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 materially (sic) to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”**

7. This is the approach a Court seized with a first Appeal must take in determining the same.

8. The suit was commenced by a Memorandum of Claim dated 2<sup>nd</sup> October 2018 and later amended on 12<sup>th</sup> February, 2019 in which the claimant stated that he was employed as a security guard by the respondent at a monthly salary of Kshs 18,000.

9. That he worked diligently and continuously from January, 2016 to 19<sup>th</sup> January, 2018, when his employment was terminated by a letter given to him on the said date.

10. The claimant pleaded that the termination was unlawful and unfair and claimed various reliefs set out in the Statement of Claim.

11. The matter was defended by a Memorandum of Reply dated 31<sup>st</sup> October, 2018.

12. The matter went to trial on 24<sup>th</sup> April, 2019 when the claimant (P.W.1) testified that he was 54 years and a person living with disability after being involved in a road traffic accident.

13. That his claim against the respondent is for unfair termination without notice, certificate of service, and without payment of final dues.

14. That he was employed by the respondent on 20<sup>th</sup> January, 2016 as a Security guard and was not given a contract of employment. That he was deployed to various stations.

15. That on 28<sup>th</sup> February, 2016, he was involved in a Road Traffic Accident when going home from work station at Fortis Suits when a motor vehicle knocked the claimant down. That the Operations Manager came to the scene of the accident together with the 2<sup>nd</sup> respondent Benjamin Mossas and rushed the claimant to Kenyatta National Hospital. That in the months of March, April, May, June and July, 2016, the Claimant was admitted in hospital without treatment and the Respondent did not bother to follow upon the claimant's status.

16. That on 22<sup>nd</sup> June, 2016, the claimant forced his discharge from the hospital and went to Kijabe Hospital Courtesy of National Hospital Insurance Fund (NHIF). That the appellant was not paid during hospitalization and his National Hospital Insurance Fund dues were not remitted.

17. That in August, 2016 the appellant was called back to work by the 1<sup>st</sup> defendant and was trained on controller duties supervised by the 2<sup>nd</sup> defendant. That on 3<sup>rd</sup> November, 2016, the Appellant was admitted at Kijabe Hospital and was operated and discharged.

18. That on 1/12/2016 the appellant was confirmed to the controller position verbally. That the Appellant worked from 6 am to 6 pm daily including weekends and public holidays. That the appellant did patrols and supervision using motor vehicles KBY 765W and KCB 81913 owned by the 1<sup>st</sup> Defendant.

19. That on 10<sup>th</sup> December, 2016, the 2<sup>nd</sup> defendant advised the 1<sup>st</sup> defendant to provide the appellant with Work Injury Benefits Act (WIBA) forms. That the appellant processed and signed the said forms claiming Kshs 538,388. That payment was not made to date.

20. Appellant testified that he was injured in the course of his work. The Appellant testified that the non-payment was because the 1<sup>st</sup> defendant had not taken out an insurance cover for the workers.

21. On 28<sup>th</sup> November, 2017, the appellant was transferred to 1<sup>st</sup> defendant's Training school at Syokimau. At the school, the appellant stated that he worked for 24 hours without relief.

22. On 19/12/2017, the appellant received a warning letter from Tom Ndale the Human Resource Officer and on 11<sup>th</sup> January, 2018, the appellant received a text message from the Human Resource Officer to attend a meeting in the 2<sup>nd</sup> respondent's office. The appellant was served with a show cause letter and a final warning. The appellant was later given a blank paper and told to resign. The appellant continued working but on 17<sup>th</sup> January, 2018, the 2<sup>nd</sup> respondent instructed the appellant to move out of the school and his goods were thrown out of the company house.

23. The appellant slept at the 1<sup>st</sup> defendant's gate. The appellant reported the matter at Mlolongo Police Station but was instead placed in the cells. He was released by the Officer Commanding Station (OCS) after 35 minutes. On 19<sup>th</sup> January, 2018, the Human Resource Manager handed a letter of termination to the appellant which he received and signed.

24. The appellant was accused of deserting work. The appellant was not paid any terminal benefits to date.

25. Under cross-examination, the appellant admitted that he had a previous record of conviction upon which he was jailed for 3 years. The appellant also stated that his hospital bills when hospitalized were paid by National Hospital Insurance Fund (NHIF). The appellant stated that AAR declined to pay him compensation for the injuries suffered in a road traffic accident. The appellant denied that he absconded duty.

26. D.W.1 Benjamin Mossas Sagaya testified for the defendants. He said he was the Managing Director of the respondent and relied on a witness statement. D.W.1 stated that the appellant was their employee from January, 2016. That in February, 2016, the appellant was involved in a road traffic accident whilst riding his motor cycle from work to his home. That the appellant was away for about 13 to 14 months after the accident. That his bills were paid and his job was not terminated during that period.

27. That the appellant came back and was given front office work to record the occurrence book. The appellant was later transferred to the Training school. That the appellant had issues and D.W.1 gave him verbal warning. That at the training school, the appellant was threatening recruits. That the appellant was accommodated at the school and he stayed with his family in a restricted area. The appellant was issued a warning letter and later a notice to show cause and he was given a final warning. The appellant wrote an apology.

28. That later the respondent was summoned by the Labour department. That the respondent issued a cheque in favour of the appellant but he did not collect it at the labour office.

29. Under cross-examination D.W.1 stated that the employment of the appellant was terminated on 19/1/2018. That he had received two (2) warning letters before the termination.

30. D.W. 1 stated that the appellant's salary was retained since he was not cleared by the respondent.

31. D.W.1 stated that the respondent could not comply with the letter from the labour office.

32. D.W.1 said that the appellant was involved in substance abuse though no tests were carried out on him. D.W.1 stated that the appellant was given notice to vacate company premises.

33. D.W.1 said that the appellant absconded duty.

34. Both witnesses produced list of documents in support of their respective cases.

35. In the judgment of the lower Court, the learned Magistrate held *inter alia*:-

“... it is clear from the evidence adduced that the employer-employee relationship herein experienced serious turbulence culminating in the claimant's termination of employment with the 1<sup>st</sup> respondent. The parties herein have traded accusations and counter accusations against each other. There is however a clear procedure that the 1<sup>st</sup> respondent adopted to address this issue. It is not in doubt that the claimant was issued warning letters and a notice to show cause. It is clear that the relationship was at an irredeemable point. I find and hold that the 1<sup>st</sup> respondent had a right to terminate the employment.”

36. The learned magistrate went on to find that the 1<sup>st</sup> respondent involved the Labour Ministry in this dispute and stated:-

“ The claimant's interests were well taken care of. The summary dismissal entitles the claimant to certain payments. I find and hold that the payments as drawn by the labour officer are correct as contained in the letter dated 6<sup>th</sup> April, 2018.

37. The learned magistrate went ahead to award the appellant **Kshs 39,907** comprising of Kshs 18,000 notice pay; Kshs.12,307 in lieu of leave and Kshs.9,600 for 16 days worked.

38. In this evaluation of the pleadings and evidence before Court, the learned trial magistrate did not address himself to various issues raised by the claimant in his testimony, including:-

(i) Whether the claimant was entitled to payment of overtime.

(ii) Whether the 1<sup>st</sup> respondent remitted all National Hospital Insurance Fund (NHIF) and National Social Security

## Fund (NSSF) dues for the claimant.

(iii) Whether or not the 1<sup>st</sup> respondent followed the provisions of Section 36, 41, 43 and 45 of the Employment Act, 2007 in terminating the employment of the claimant.

39. With respect to the issue of overtime claimed by the appellant, P.W.1 adduced evidence that was not controverted by D.W.1 that whilst working as a controller from August, 2016, up to the time he suffered injuries, he worked from 6 am to 6 pm all days of the week including weekends and public holidays and was not paid overtime by the 1<sup>st</sup> respondent.

40. The appellant further testified that when he was transferred to the Training School he worked for 24 hours and had no reliever.

41. D.W.1 did not controvert this evidence adduced by P.W.1 at all. The learned trial magistrate completely ignored this issue in his judgment.

42. The appellant had in the memo of claim claimed Kshs.125,100 being unpaid overtime by the 1<sup>st</sup> respondent for the extra 4 hours worked daily and for work done during weekends and public holidays.

43. The 1<sup>st</sup> respondent having failed to controvert this evidence by the appellant, this Court finds the claim for unpaid overtime was proved by the appellant on a balance of probabilities and awards the appellant accordingly.

44. Secondly, the appellant claimed Kshs 2,400 being unremitted National Social Security Fund and National Hospital Insurance Fund dues by the 1<sup>st</sup> respondent. Again D.W.1 did not address this issue at all and the learned magistrate completely ignored the matter in his judgment. The Court finds that the appellant had established on a balance of probabilities that the 1<sup>st</sup> respondent had failed to remit Kshs 2,400 statutory dues in the appellant's favour and the Court enters judgment in favour of the appellant accordingly.

45. Thirdly, the appellant had sought to be given certificate of service in terms of section 51(1) of the Employment Act, 2007. The 1<sup>st</sup> respondent did not address this issue at all in his testimony. The 1<sup>st</sup> respondent stated that the appellant did not clear and so could not be paid his terminal benefits. This Court finds that the 1<sup>st</sup> respondent is bound to provide the appellant with a Certificate of Service as pleaded in the Memorandum of Claim and orders accordingly.

46. Fourthly, in the Memorandum of reply to the Statement of Claim, the 1<sup>st</sup> respondent had provided four particulars of misconduct by the appellant which led to termination of his employment as follows:-

***(i) The claimant on several occasions did not perform his responsibilities as required. During the claimant's employment as follows:-***

(a) The claimant on several occasions acted unprofessionally jeopardising the well-being of his colleagues.

(b) As a controller at the training school of the 1<sup>st</sup> respondent, the Claimant brought into the facility strangers without any authorization from the management. This behavior by the claimant was in total contravention of the 1<sup>st</sup> respondent's code of conduct and regulations.

(c) The claimant openly involved himself in substance and drug abuse, and would thereafter harass and disturb the recruits at the training school and even lock them out of the premises.

(d) The claimant stole food stuff belonging to the students at the training facility and would force the students to give him food meant for the students instead of catering for his own meals as required. “

47. The appellant had pleaded in the Memorandum of Claim that he performed his duties with diligence, enthusiastically, reliably, honestly and was responsible during his employment which earned him favour with the employer and promoted him to the position of a controller.

48. In his testimony before Court, the appellant denied having misconducted himself at work. It was upon D.W.1 to discharge the onus placed on the employer in terms of Section 43(1) and (2) to demonstrate that it had a valid reason to terminate the employment of the Appellant. D.W.1 Benjamin Mossas Sagaya did not adduce any sufficient evidence to show that the appellant was guilty of the offences the respondent pleaded he had committed in the course of his duty leading to the termination. The record does not disclose any such specific evidence adduced by D.W.1.

49. The learned trial magistrate failed to address himself on this particular issue to satisfy himself that there was a valid reason to terminate the employment of the appellant. Indeed, D.W.1 did not also demonstrate that it had held a proper disciplinary hearing to establish the guilt of the appellant before the 1<sup>st</sup> respondent chased the appellant from its premises. The allegations of absconding work, engaging in substance abuse; harassment of recruits and allowing strangers into the training school was not proved by D.W.1 so as to justify the termination of employment of the Appellant.

50. The Court finds that the appellant discharged the onus placed on him under Section 47(5) of the Employment Act, 2007 to demonstrate that the termination of his employment was wrongful and unfair. Once the appellant had demonstrated that, it was incumbent on the 1<sup>st</sup>

respondent to discharge its evidential burden placed on it under Sections 43, 45, and 47 of the Act, which it failed to do.

51. The Court therefore finds that the termination of employment of the claimant was unlawful and unfair and allows the appeal in this respect.

52. The appellant is entitled to compensation under Section 49(1) (c) and (4) of the Employment Act.

53. Having evaluated the evidence before the trial Court afresh, the Court has established that the appellant had served the 1<sup>st</sup> respondent from 20/1/2016 up to 11/1/2018 when his employment was terminated. The appellant had served diligently during that period and suffered serious injuries arising from a road traffic accident whilst going home from work. That the appellant was not compensated under Work Injury Benefits Act for those injuries and his employment sustainability was seriously jeopardised by those injuries. The appellant did not contribute to the termination. The appellant was not paid terminal benefits nor compensated for the wrongful termination. The appellant was not given Certificate of Service to enable him get alternative work. The appellant lost prospects of career progression in the security industry and suffered loss and damage. The Court has considered the case of **Kenfright (E.A) Limited –vs- Benson K. Nguti [2019] eKLR - Petition No. 37 of 2018** where the Supreme Court held that remedies under Section 49 of the Employment Act are available at the discretion of this Court in all situations of unfair dismissal.

54. It would be remiss on our part to remit this matter to the trial Court for assessment of damages when facts before us suffice to allow this Court to exercise its discretion to make an award of compensation based on the record before us. Expediency is a critical ingredient of justice and it is therefore fair and just to conclude this matter in this aspect.

55. Considering all the factors set out herein before in terms of Section 49(4), the Court awards the appellant the equivalent of five (5) months' salary in compensation for the wrongful and unfair dismissal in the sum of **Kshs (18,000 x 5) = 90,000.**

56. The awards of notice pay in lieu of leave and arrear salary granted by the trial Court are upheld.

57. This Court is not properly seized with the claim for payment of damages under Work Injury Benefits Act.

58. The Magistrates' Court had no jurisdiction to deal with the matter in the first place, since any appeal arising from a decision of the Director of Occupational Health and Safety could only come to this Court by way of a direct appeal in terms of the Work Injury Benefits Act (WIBA).

59. The appeal in respect of this claim lacks merit and is dismissed.

60. The appellant did not adduce any evidence before the lower Court regarding the claim for payment of service pay under Section 35(5) of the Employment Act. The appellant was duly registered with National Social Security Fund (NSSF) and therefore service pay under this provision is not applicable to the appellant.

61. In the final analysis, judgment is entered in favour of the appellant against the 1<sup>st</sup> respondent as follows:-

(a) Kshs 90,000 in compensation for the wrongful and unfair dismissal.

(b) Kshs 18,000 in lieu of one month's notice.

(c) Kshs 125,600 overtime.

(d) Kshs 11,400 being arrears.

(e) Kshs 2,400 unremitted National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF)

(f) Salary for 19 days worked and Kshs 12,309 in lieu of leave days not taken.

**Total award:** Kshs 259,709.

(g) Interest at Court rates from date of judgment till payment in full.

(h) Costs before the lower Court and this Court.

(i) Certificate of Service to be provided to the Appellant within 30 days of this judgment.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF JULY, 2021.**

**MATHEWS N. NDUMA**

**JUDGE**

## **ORDER**

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MATHEWS N. NDUMA**

## **JUDGE**

### **Appearances**

Appellant in person.

Mr. Muthuyu for Respondent

Ekale – Court Assistant