



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CIVIL APPEAL NO E002 OF 2020

SIFA INVESTMENTS LIMITED.....APPELLANT

VERSUS

NICODEMUS MUTUNGA.....RESPONDENT

(Appeal from the judgment of Hon G. Kiage, SRM delivered on 4th September 2020

in Mombasa CMELRC No 144 of 2018)

JUDGMENT

Introduction

1. On 13th August 2018, the Respondent (Claimant in the trial court) filed a Memorandum of Claim at the Chief Magistrate’s Court at Mombasa, seeking compensation for unfair termination of employment plus terminal dues.
2. The Appellant (Respondent in the trial court) filed a Response to the Memorandum of Claim on 4th June 2019.
3. The matter was heard by **Hon G. Kiage, SRM** who in a judgment delivered on 2nd September 2020, made an award in favour of the Respondent as follows:

- a) Six months’ salary in compensation.....Kshs. 211,338
- b) Payment in lieu of notice.....35,223
- Total.....246,561**

4. Being discontented with the judgment, in as far as it allowed the Respondent’s claim for unlawful termination, the Appellant preferred the present appeal.

The Appeal

5. In its Memorandum of Appeal dated 2nd October 2020, the Appellant raises the following grounds of objection:
 - a) That the learned trial Magistrate erred in law and in fact in holding that the Respondent’s employment with the Appellant had been wrongfully and unprocedurally terminated;
 - b) That the learned Magistrate erred in fact in holding that there was no evidence of the Respondent having been invited to a disciplinary meeting when the material on record, including parts of the Respondent’s own evidence, demonstrated that he had attended such a meeting and rendered a written response to the complaints levelled against him;
 - c) That the learned Magistrate erred in his appreciation of the law with regard to the disciplinary process and in his reliance on absence of minutes of a meeting as trumping the uncontested fact of a disciplinary meeting having taken place;
 - d) That the learned Magistrate erred in his finding that there was no proof of termination notice having been given to the

Respondent;

e) That the trial Magistrate erred in failing to find that the grounds for termination satisfied Section 43 of the Employment Act, 2007 as read with Section 44(4) thereof;

f) That the trial court erred in its interpretation of the provisions of Section 41 of the Employment Act, 2007 vis-a-vis the evidence on record, as to who were present during the disciplinary process and/or the conduct thereof and in any event neither the pleadings nor the evidence led for the Respondent had disclosed the exact nature of breach of his rights thereunder.

Determination

6. This being a first appeal, I am required to reconsider and re-evaluate the evidence, and being minded that I did not have the opportunity to encounter the witnesses, reach my own conclusions.

7. This edict was restated by the Court of Appeal in *National Bank of Kenya v Samuel Nguru Mutonya [2019] eKLR* in the following terms:

“...we are enjoined to revisit the evidence presented before the court below afresh, analyse it in order to arrive at our own independent conclusion but bearing in mind that we did not see or hear the witnesses as they testified.”

8. The Appellant's six (6) grounds of appeal speak to the twin issues of reason for termination and the procedure adopted in the termination transaction.

9. In his judgment delivered on 4th September 2020, the learned trial Magistrate stated thus:

“The letter dated 18.7.2019 makes reference to deliberations at a meeting but it is unclear how the said meeting was convened. Section 41 of the Employment Act requires the employer to explain to the employee the reasons for termination and the employee is entitled to have another employee or a shop floor union representative of his choice during the explanation. Whether or not the requirements of the said section were met one cannot decipher from the said letter. In the present instance therefore the employer has not supplied any proof that a properly constituted meeting was held prior to the claimant's termination. In the absence of such proof the inescapable conclusion is that the claimant was terminated unprocedurally.”

10. The termination of the Respondent's employment was communicated to him by letter dated 28th July 2018 stating:

“Re: 30 days Notice and Leave Year 2017/2018-(21-3) 18 days plus leave year 2018/2019 Prorate 3 months-5 days altogether 23 days running concurrently

In reference to our letters dated 16th, 18th and 20th July 2018, once more we remind you that you declined to take lawful instructions from persons placed in authority thereafter declined to bear loss (sic). You acted alone whilst other drivers obeyed instructions to load export. Owed to this you forced us to shift you to temporarily placement on local shipments only which indeed is in acute shortage and on other side not adding any value against salary payable to you (sic). As of now you are doing nothing of value at the yard since you have not done any work since last arrived on around 16th July (sic). Its therefore a loss to us as pegged on high salary you are earning without significant income hence given you 30 days notice with effect from 28th July to 27th August 2018 (sic). Your leave which you had requested vide letter dated 16th July balance for the year 2017/2018 (21-3)-18 days plus year 2018/2019 prorate (3 months)-5 days, totals 23 days, same is now allowed running concurrently with notice starting from 30th July to 24th August 2018 (sic). Before going leave make exit clearance with Mr. Danson today 28th July and have the form signed by all and hand it to HR office including pass by Monday morning, 30th July as will activate final dues (sic). Any dues to your favour shall be paid upon expiry of this notice.

Thank you

Yours faithfully,

FOR SIFA INVESTMENTS LTD

(signed)

M. Khaku

Financial Controller”

11. This letter presents a mixed grill of reasons for termination of the Respondent's employment. What then was the real reason for the termination? On 16th July 2018, the Appellant wrote to the Respondent, accusing him of failure to pick return export cargo from Kampala to Mombasa, occasioning loss of Kshs. 95,000. By the same letter, the Respondent was required to show cause why the said loss should not be recovered from him. He was further withdrawn from his regular duties and instructed to remain at the drivers' bench located at the main gate security area.

12. The Respondent responded to the Appellant's letter on the same day, explaining the circumstances under which he had returned from Kampala to Mombasa, without return export cargo. The Respondent also challenged the Appellant's decision to surcharge him in the sum of Kshs. 95,000.

13. By a further letter dated 18th July 2018, the Appellant reduced the surcharge amount to Kshs. 85,000 which was to be recovered from the Claimant at the rate of Kshs. 5,000 per month.

14. In yet another letter to the Respondent dated 20th July 2018, the Appellant, while acknowledging that there may have been delay in accessing the return export cargo, rescinded the decision to surcharge the Respondent and assigned him truck registration number KBX 281P, which did not load exports. By the same letter, the Appellant declined the Respondent's request to proceed on leave.

15. From the foregoing correspondence, it is evident that at the time the Appellant's employment was terminated, the issue of his failure to pick return export cargo had been dealt with and concluded. The only surviving issue was therefore lack of work in his area of re-deployment, thus rendering him idle. I agree with the Respondent's submissions that this was an issue of redundancy not misconduct.

16. What is clear is that the issue of the Respondent being idle was never discussed prior to the termination. It follows therefore that there was no valid reason for the termination of employment, as contemplated under Section 43 of the Employment Act.

17. Moreover, the procedural fairness requirements set by Section 41 of the Act were not adhered to. Additionally, the Appellant exhibited bad faith by denying the Respondent the opportunity to take his annual leave, even when there was no work for him and instead traded his leave entitlement for notice.

18. This Court has stated in the past and it bears repeating that leave and notice are two mutually exclusive rights and one cannot be traded for the other (see *Fulgence Msangachi Mgholo v Hakika Transport Services Limited [2018] eKLR*).

19. Overall, I agree with the learned trial Magistrate that the termination of the Respondent's employment was unlawful and unfair. As a result, I find no reason to interfere with the award by the trial court.

20. This appeal therefore fails and is dismissed with costs to the Respondent in the trial and in the appeal.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY SEPTEMBER 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. Mwakisha for the Appellant

Mr. Anaya for the Respondent