



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

APPEAL NO. E005 OF 2021

KENYA KAZI SERVICES LTD.....APPELLANT

VERSUS

DICKSON ONJWAYA WASIKE & 42 OTHERS.....RESPONDENTS

(Appeal from the judgment and decree of the Honourable R.K. Ondieki (SPM) in the Chief Magistrates Court in Kisumu delivered on 2nd February 2021 in Chief Magistrates Employment & Labour Relations Cause Number 94 of 2019 consolidated with CMEL Nos. 95 of 2019, 96 of 2019, 97 of 2019, 98 of 2019, 99 of 2019, 100 of 2019, 101 of 2019, 102 of 2019, 103 of 2019, 104 of 2019, 105 of 2019, 106 of 2019, 107 of 2019, 108 of 2019, 109 of 2019, 110 of 2019, 113 of 2019, 114 of 2019, 158 of 2019, 159 of 2019, 160 of 2019, 161 of 2019, 162 of 2019, 163 of 2019, 186 of 2019, 187 of 2019, 188 of 2019, 189 of 2019, 190 of 2019, 191 of 2019, 202 of 2019, 208 of 2019, 40 of 2020, 41 of 2020, 48 of 2020, 49 of 2020, 50 of 2020, 62 of 2020, 65 of 2020, 80 of 2020 and 81 of 2020)

JUDGMENT

1. Dickson Onjwaya Wasike (the Respondent) sued Kenya Kazi Services Ltd (the Appellant) before the Magistrates Court, and he stated the Issues in Dispute as:

(i) Unlawful and unfair dismissal from employment.

(ii) Non-payment of terminal dues.

2. On different dates, some 42 former employees of the Appellant sued it (Appellant), raising similar issues of fact and law, and by consent of the parties on 4 October 2019, the Causes were consolidated.

3. The Magistrate took evidence and, in a judgment delivered on 2 February 2021, found in favour of each of the Respondents and made awards under the heads of:

Salary in lieu of notice

Overtime

Gratuity

Damages for loss of employment and

Leave earned.

4. The Appellant was aggrieved, and it lodged a Memorandum of Appeal with the Court on 25 February 2021, contending that:

(i) The learned Magistrate erred in holding that the Respondents were terminated on 28th January 2019 and that such termination was unfair.

(ii) The learned Magistrate erred in law by transferring the burden of proof to the Appellant of proving that the Respondents were denied entry into their place of work by the night guards.

(iii) The learned Magistrate erred in failing to hold that the Respondents were subjected to a fair disciplinary process in accordance

with section 41 of the Employment Act.

(iv) The learned Magistrate erred in failing to hold that the Respondents engaged in an illegal strike on 28th January 2019.

(v) The learned Magistrate erred in holding that the Respondents did not receive terminal dues.

(vi) The learned Magistrate erred in making an award to the Respondents for overtime and in holding that the Respondents were each entitled to payment of 77 hours per month as overtime from 1st June 2012 to 11th February 2019, notwithstanding that this was time-barred and not pleaded by the Respondents.

(vii) The learned Magistrate erred in holding that the Respondents were entitled to gratuity pay from 1st February 2017 to 28th January 2019.

(viii) The learned Magistrate erred in awarding the Respondents leave pay when the Respondents did not plead or prove an entitlement to leave pay and despite not making a finding on leave in the judgment.

(ix) The learned Magistrate erred in awarding the Respondents the maximum 12 months' salary as damages and in combining the prayers for general damages for loss of employment and general damages for trauma and loss of earning.

(x) The learned Magistrate erred in awarding the Respondents notice pay that was not based on the salaries stipulated in the Respondents individual contracts of employment.

(xi) The learned Magistrate erred in making an award for Kshs 58,794,719 plus interest and costs, while the Court's jurisdiction (Senior Principal Magistrate) is a maximum of Kshs 15,000,000.

5. On the same day, the Appellant filed a Motion under a certificate of urgency seeking an order staying execution of the decree from the Magistrates Court.

6. The Court directed the Appellant to serve the Motion ahead of giving further directions on 9 March 2021.

7. On 3 March 2021, the Respondents filed a Memorandum of Cross-Appeal asserting that:

(i) The learned trial Magistrate erred in law and fact in disregarding the weight of the evidence adduced by the Respondents regarding the nature and extent of the loss of salaries for the remainder of the contract period, thereby failing to award each of the Claimants loss of salary for the remainder of the contract period as pleaded as to amount to travesty of justice.

(ii) The learned trial Magistrate erred in law and fact in failing to take into account the totality of the material placed before him by way of submissions, therefore, arriving at the wrong assessment of the overtime arrears and gratuity payable to each of the Claimants as pleaded.

(iii) The learned trial Magistrate disregarded the principles of precedent and stare-decisis on comparable and like cases, thereby employing wrong principles in determining the loss of salary for the remainder of the contract, gratuity and leave payable to each of the Claimants as pleaded as to occasion a travesty of justice.

(iv) The trial Magistrate occasioned a travesty of justice by misapprehending the law.

8. When the parties appeared on 9 March 2021, the Court took brief oral submissions from them and granted a stay of execution pending hearing and determination of the Appeal on condition that the Appellant deposits Kshs 30,000,000/- in an interest-earning account in the names of the advocates on record.

9. The Court also directed that a Supplementary Record of Appeal and submissions be filed.

10. The Appellant filed a Supplementary Record of Appeal on 25 March 2021 and submissions on 28 May 2021.

11. The Respondents filed joint submissions on 29 June 2021.

12. The Court has considered the record and submissions and will examine first the awards arising from the alleged breach of contract.

Overtime

13. The Appellant challenged the award of overtime on three grounds, first that it was not pleaded, secondly, that it was anchored on a judgment that was not part of the pleadings and lastly, that the law of limitation caught up the head of the claim.

14. The Court has looked at the Memorandum of Claim(s) filed before the Magistrate. Save for the name of the Claimants, the pleadings were a replica of each other and overtime was pleaded at paragraph(s) 8.

15. On the second limb of challenge on overtime, the Respondents who testified admitted that the claims for overtime were founded upon a Court award delivered in 2013, Nairobi Cause No. 1449 of 2011, *Kenya National Private Security Workers Union v Kenya Kazi Services Ltd*.

16. The Respondents did not set out or make any reference to Nairobi Cause No. 1449 of 2011, *Kenya National Private Security Workers Union v Kenya Kazi Services Ltd* in their individual Memorandum of Claims.

17. If the same had been pleaded, then the Appellant would have had an opportunity to respond substantively to the relevance and materiality of the judgment.

18. Therefore, the Magistrates Court fell into error by giving as one of the reasons for the award of overtime Cause No. 1449 of 2011, *Kenya National Private Security Workers Union v Kenya Kazi Services Ltd*.

19. On the merits and proof of the overtime head of claim, none of the 6 Respondents who testified gave particulars of the overtime or disclosed the number of prescribed working hours in the sector the Appellant operated in beyond which overtime would be payable.

20. It was only at the stage of cross-examination and re-examination that the Respondents gave paltry details on overtime but confirmed that overtime worked would be paid at the end of the month.

21. The Court has looked at copies of the payslips which were placed before the Magistrate's Court. The pay statements indicate that the Respondents were paid overtime appropriately at the end of each month.

22. With the pay statements, the Court finds that the Magistrate Court erred in finding that the Respondents were entitled to further overtime.

Gratuity

23. The Magistrates Court awarded the Respondents gratuity from 2017 to 2019 on the basis that it was part of the contractual agreement(s) between the parties and because a finding had been made that the dismissals were unfair.

24. The Appellant impugned the award of gratuity on the grounds that it went against the express contractual provision and the law. It was contended that gratuity was only due where an employee had continuously served for at least five years.

25. The second ground of attack was that an employee who had been summarily dismissed was not entitled to gratuity.

26. The Appellant cited the decision of the Court of Appeal in *Bamburi Cement Ltd v William Kilonzi* (2016) eKLR wherein it was stated:

Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a contract or upon resignation or retirement, or upon the death of the employee, as a lump sum amount at the discretion of an employer.... Being a gratuitous payment, the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct.

27. The Respondents, on the other hand, maintained that gratuity was payable because had it not been for the unfair summary dismissal(s), each of the Respondents would have been eligible for payment of gratuity.

28. In the view of this Court, gratuity becomes due provided any applicable conditions are present. In other words, where a contract provides for gratuity, it is payable as a general rule.

29. Like with any general rule, there are exceptions. The contract between the Appellant and Respondents had a restrictive condition on eligibility for gratuity.

30. The relevant contractual clause provided that:

After five years of service with the employer, the employee shall be entitled to 18 days' pay for each completed year of service by way of gratuity based on the employee's wage at the time of termination of service. The company will pay gratuity in the event of termination of employment under the following conditions.

(i) It will only be payable to employees who have completed five (5) continuous years of service at the termination of their contract.

(ii) In the event an employee is entitled to gratuity pay, it will be paid in full into the employee's bank account within 30 days of the termination of employment.

(iii) It will be calculated by dividing the basic pay by 30 days and multiplying by 18 days per completed year of service.

(iv) An employee who is summarily dismissed for lawful cause or who terminates his services for any reason other than certified ill health shall not be entitled to gratuity.

31. Some of the Respondents had served for more than 5 continuous years but under separate contracts for which they were paid.

32. At the time of dismissal, the Respondents had served for about 2- years of the new contracts.

33. In the Court's view, the eligibility to gratuity would depend on the answer to the question of whether the dismissals were unfair.

34. The Court, in effect, would agree with the Magistrates Court and finds that the Respondents would be entitled to full or *pro-rata* gratuity if a finding is made that their dismissals were unfair.

Accrued leave

35. Annual leave of at least 21 days with full pay is a statutory entitlement of each employee.

36. Under section 10(3)(a)(i) of the Employment Act, 2007, the employer is expected to outline the entitlement to any accrued leave at the time of termination.

37. The Appellant produced records before the Magistrates Court to demonstrate that each of the Respondents' outstanding leave days had been commuted and paid to their bank accounts.

38. The Magistrates Court seems to have failed to take into account the payments made in respect of accrued leave, and the Court finds that the Court fell into an error of both fact and law in awarding this head of the claim to the Respondents.

Was there unfair termination of employment?

39. Grounds (i), (ii), (iii), (iv), (ix) and (x) broadly addressed the question of whether the separation between the Appellant and Respondents were unfair and what would have been the appropriate remedies.

40. In order to determine whether a termination of employment was fair, the Court must examine both procedural and substantive aspects of the decision.

Procedural fairness

41. In terms of the procedural fairness requirements, section 35(1) of the Employment Act, 2007 envisages written notice of termination of the employment (unless it is a case of summary dismissal within the context of sections 36 and 44 of the Act).

42. Section 41 on its part requires the employer to allow the employee to make representations.

43. The Respondents herein were summarily dismissed.

44. The Respondents who testified admitted that the Appellant issued show-cause notices.

45. The Court has perused the show-cause notices produced. They set out the allegations each of the Respondents faced and requested them to make written responses by set dates.

46. The Appellant then invited the Respondents to appear for oral hearings, which they attended. The record indicates that trade union representatives were present during the hearings.

47. In making a determination that the dismissal of the Respondents was procedurally tainted, the Magistrates Court relied on the fact that the notices envisaged under section 35(1) of the Employment Act, 2007 were not given.

48. The Respondents were summarily dismissed. They were afforded a chance to make oral representations as demanded by section 41(2) of the Employment Act, 2007.

49. Consequently, this Court is of the view that the notice required under section 35(1) of the Act was not mandatory, and if at all it was mandatory, any failure was cured by the show-cause notices.

50. In this Court's considered view, and the Court finds, the Appellant was in substantial compliance with the dictates of procedural fairness.

Substantive fairness

51. It is the employer who initiates the process of terminating the employment contract, and therefore it is understandable why sections 43 and 45 of the Employment Act, 2007 place a burden on the employer to not only prove the reasons but that the reasons are valid and fair.

52. The reasons which were given for the dismissal of the Respondents were:

(i) Insubordination.

(ii) Failure to report on duty on January 28, 2019, instead staged a sit-in/industrial disruption (at the rear side of WPR Kondele site).

(iii) Disobeyed orders and management directives to return to work.

53. To discharge the burden of proving the validity and fairness of the dismissals, the Appellant called two witnesses, a Deputy Guard Force Commander, Western Region and Head of Security Services.

54. The Appellant's first witness testimony related majorly to events said to have transpired at the Kondele site.

55. In respect to the Respondents based in Kericho, the witness referred to an email sent to him by the US embassy but stated he had not filed a copy in Court.

56. During cross-examination, the witness stated that he had no proof that the Respondents had gone on strike or the instructions which were issued to them by the head office in Nairobi. He also testified that he visited the sites and found the Respondents sitting at their respective places of work.

57. In re-examination, the witness talked of a court order stopping the Respondents from going on strike.

58. The second witness testified that there was (a) meetings held in Nairobi on 27 January 2019 and 28 January 2019 to discuss industrial action by the Respondents but that he was not privy to the discussions as she did not have the minutes.

59. Under cross-examination, the witness stated that she did not know the nature of the sit-down in Kisumu and could not confirm whether the Respondents were at their places of work.

60. The first Respondent to testify was deployed to Kisian, and he stated that he was a Crew Commander. He testified that upon reporting to work on the material day, they were informed to await further instructions from Nairobi. The witness stated that he recorded their reporting to work in the Occurrence Book (OB).

61. The witness further testified that he was directed by his In-Charge called George, to surrender the vehicle he was commanding while he was travelling to fuel.

62. The said George was not called to testify, nor was the failure explained.

63. The second Respondent to testify was based in Kericho. She testified that she reported to work at 5.40 am for the day shift (with 10 others) and that they got a brief from two supervisors, Steve Ayanga and Faith Nyawira and worked until 5.30 pm when they were informed of a meeting in Nairobi and asked to hand over.

64. According to the witness, when she reported to work the next day, she was instructed by the supervisor called Faith Nyawira to report to the Kisumu offices.

65. The supervisors who were named by this particular witness as being on the ground were not called to testify. The failure was not explained.

66. The third witness, a Chief Supervisor, testified that he was also based at Kisian and that he reported on duty on the material day at 5.15 am with some 13 guards under him, but they were denied access by a junior guard called Robert Gitau.

67. The witness stated that he made calls to his immediate senior called Hurea severally to seek clarification, but he did not pick the calls.

68. Mr Hurea eventually appeared with other guards at about 6.00 pm and instructed them not to report on duty the next day.

69. Mr Hurea was not called, and the failure to call him was not explained.

70. The fourth witness was based at Kondele. He was a Shift Supervisor with about 16 guards under him. He testified that he reported to work on 28 January 2019 at 5.35 am and that his supervisees also reported to work, but the Senior-in-Charge (Mr Murea?) instructed them not to take up duties while waiting for instructions from Nairobi where a meeting was ongoing.

71. According to the witness, at about 4.00 pm, they were informed that there were guards from Nairobi to take over from them and that they handed over to the guards.

72. The In-charge who communicated with this witness was not called to testify.

73. The fifth witness was based in Kombewa, and he testified that he reported to work at 5.30 am on 28 January 2019 together with six other guards but were denied access by a senior guard.

74. The Appellant did not present any witness from the facility to rebut the testimony by this witness.

75. The last witness for the Respondents was an employee who also served as a shop steward. His testimony that he reported to work on 28

January 2019 at 1730 hours for the night shift but was denied access and that the Head of Security took his badge was not controverted by testimony from the named Head of Security.

76. The evidence of the Appellant's second witness was not very relevant as to whether there were valid and fair reasons to dismiss the Respondents.

77. The Appellant did not call any witnesses who were privy to what was going on in the different assignments/sites.

78. The failure to call them was not explained.

79. The Appellant's first witness was the one on the ground.

80. The Court has keenly gone through his witness statement, which was adopted as part of the evidence, as well as the notes taken by the Magistrates Court. The relevant portions of the evidence are in paragraphs 11 to 19.

81. Although this witness's statement and oral testimony suggest tell-tale signs that an industrial dispute was simmering, it was upon the Appellant to prove that the Respondents individually or jointly failed to report on duty or took part in a strike.

82. The oral testimony by the Respondents who testified in Court is that the Respondents reported to work but were denied access to their workplace (s) or were given instructions to visit the Appellant's regional office where they were given show-cause notices.

83. The Appellant's employees who were mentioned by the Respondents as having locked them out were not called.

84. If there were any formal communications on the industrial action, the same were not produced in Court.

85. The Appellant's first witness did not disclose how, where and at what times he engaged with the Respondents.

86. The Court, therefore, finds that the Appellant did not discharge the burden of proving that the Respondents failed to report to work on 28 January 2019.

87. The Appellant had given two other reasons for dismissing the Respondents, insubordination and disobeying orders to return to work.

88. The Appellant did not lay an evidential foundation to these two reasons, such as the particulars of the persons who gave the return to work orders or the circumstances under which the orders were issued.

89. Overall, the Court finds that the dismissal of the Respondents was not for valid and fair reasons.

Compensation and damages for loss of employment

90. The Magistrates Court did not explicitly award the Respondents compensation as envisaged under section 49 of the Employment Act, 2007.

91. Instead, the Court awarded each of the Respondents *damages for loss of employment* equivalent to 12 months' salary after rendering himself:

Consequently, taking into account the provisions of section 49 of the Employment Act (supra), the Court has the discretion to adopt a relevant relief to grant in the circumstances of each claim. It is my considered opinion that upon granting a prayer for general damages for loss of employment, I shall collapse the prayers for the loss of salary for the remainder of the term and general damages for trauma and loss of earning. I consider these two prayers as a duplicate of the prayer for general damages for loss of employment.

92. Evidently, the Court fell into an error of law in deeming the damages for loss of salary for the remainder of the term of employment and damages for trauma and loss of earnings as a substitute or duplicate of the compensation contemplated by section 49(1)(c) of the Employment Act, 2007.

93. The principles upon which compensation for unfair termination of employment are awarded are expressly set out in section 49(4) of the Employment Act, 2007.

94. The Respondents were on fixed-term contracts. The contracts which the Appellant terminated had commenced on or around 1 March 2017, meaning that the Respondents had served for about 2 years.

95. In consideration of the above, the Court will set aside the award of damages for loss of employment and substitute thereof an award of compensation for unfair termination of employment assessed at 4-months gross salary for each of the Respondents.

Salary in lieu of notice

96. Having come to the conclusion that the dismissals of the Respondents were not for valid and fair reasons, the Court will leave undisturbed the award of salary in lieu of notice.

Gratuity

97. The Court has made a finding that the dismissal(s) of the Respondents were unfair. The Court will award *pro-rata* gratuity for the period 1 March 2017 to the date of dismissal.

Cross-Appeal

Loss of salary for the remainder of the contract

98. The Respondents asserted that the Magistrates Court fell in error by failing to award lost salaries for the balance of their contractual terms.

99. This Court would endorse the view in *Bank of Uganda v Tinkamanyire* (2008) UGSC 21 that:

The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

100. This Court, therefore, declines to allow this head of the cross-appeal.

Failure to consider submissions

101. The Respondents did not demonstrate before this Court the parts of their submissions that the Magistrates Court failed to consider.

Conclusion and Orders

102. From the foregoing, the Court:

(i) Sets aside the awards for overtime and accrued leave.

(ii) Sets aside the award of damages for loss of employment and substitutes thereof compensation equivalent of 4-months gross wage for each Respondent.

(iii) Affirms the award of salary in lieu of notice.

(iv) Affirms the award of gratuity.

103. The Appellant and the Respondents to jointly compute the awards in (ii), (iii) and (iv) above and file in Court within 30 days, the computations (compensation to be computed using gross salaries for December 2018 being the last full month served by the Respondents).

104. Interest on the awards from date of judgment by the Magistrates Court.

105. Respondents to have costs before the Magistrates Court and this Court.

106. The Cross-Appeal is dismissed with no order on costs.

Delivered through Microsoft teams, dated and signed in Kisumu on this 8th day of October 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Appellant Hamilton, Harrison & Mathews, Advocates

For Respondents Odhiambo Ouma & Co. Advocates

Court Assistant Chrispo Aura