



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**

**ELRC APPEAL NO. E008 OF 2021**

**ESTHER KABOLE AMBIRA.....APPELLANT**

**VERSUS**

**MINISTRY OF INTERIOR & COORDINATION OF**

**NATIONAL GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL..2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Appellant lodged Cause Number 3 of 2019 at the Bondo Principal Magistrates Court against the Respondents. She sought a declaration that her termination was unfair, wrongful and unlawfully. She further prayed that she is paid compensation for the unfair termination, an order of reinstatement, 3 months salary in lieu of notice, severance pay, General damages and a certificate of service.

2. The Respondents entered appearance but did not file a response to the claim. Interlocutory judgment was entered against them on 1<sup>st</sup> September, 2020 and the matter proceeded for formal proof on 14<sup>th</sup> January, 2021.

3. The court delivered judgment on the matter on the 5<sup>th</sup> February, 2021, wherein the learned Magistrate entered judgment in favour of the Appellant against the Respondents in the following terms:

**“i. Compensation for 12 months’ salary of Kshs 31,020 x 12 =372,240 subject to statutory deductions**

**ii. the 1<sup>st</sup> Respondent to issue the Claimant with a certificate of service**

**iii. The Claimant will have costs of the suit and interest.”**

4. The Appellant was dissatisfied with the decision of the court and filed a Memorandum of Appeal on the 5<sup>th</sup> March, 2021, premised on the following grounds:

**a. That the learned Magistrate shifted the burden and incidence of proof to the Claimant**

**b. The learned Magistrate erred both in fact and law by raising the burden of proof beyond that of a balance of probability**

**c. The judgment is against the weight of the evidence on record.**

5. The Appellant prayed that judgment be entered in her favour as prayed in her statement of claim. She further prayed to be awarded costs of the appeal.

6. Submissions on the appeal were filed for both the Appellant and the Respondents.

**The Appellant’s Submissions**

7. The Appellant submitted that the trial court denied her the prayers she sought in her claim, even when the same were not challenged. It is

her submission that the burden of challenging the claim was on the Respondents and for reason that her claim was unchallenged, the trial court ought to have allowed her prayers as per claim. She sought to rely on the holding in the case of **Caltex Oil Kenya Limited v Rono Limited (2016) eKLR**

8. The Appellant's further submission is that for reason that the Respondents did not produce any evidence, the trial court should have reinstated her back to employment.

### **The Respondents' Submissions**

9. It is submitted for the Respondents that the burden of proving that the Appellant was unfairly terminated lies with her in accordance with Sections 107 and 108 of the Evidence Act read with Section 47(5) of the Employment Act. The Respondents submit that the Appellant's termination met the requirements set out under Section 41 of the Employment Act, as the Respondents had a fair and valid reason to terminate the Appellant. They sought to rely on the case of **Kenfreight (EA) Limited v Benson K. Nguti (2016) eKLR**.

10. The Respondents submit that the Appellant was accorded an opportunity to be heard through various communications by way of letters addressed to her. They rely on the case of **Judicial Service Commisison v Gilbert Mwangi Njuguna & Another (2019) eKLR** where the court of Appeal held that an opportunity to produce full and complete written documentation was sufficient and an oral hearing is not always necessary to ensure a fair hearing and consideration of the issues.

11. The Respondents further submitted that compensation is guided by Section 49 of the Employment Act and relying on the case of **Abraham Gumba v Kenya Medical Supplies Authority (2014) eKLR**, where the court held that a grant of 10 months' compensation for a period the Claimant did not work would amount to unjust enrichment. The Respondents urged the court to disallow the prayer for 12 months' compensation as in their opinion, the termination was fair and within the law.

### **Determination**

12. The appeal herein is premised on the following grounds:

- i. That the learned Magistrate shifted the burden and incidence of proof to the Claimant**
- ii. The learned Magistrate erred both in fact and law by raising the burden of proof beyond that of a balance of probability**
- iii. The judgment is against the weight of the evidence on record**

13. Although the grounds of appeal are listed as three, they are prolix and repetitive and all translate to an alleged error on the part of the trial court, on the burden of proof.

14. The Court of Appeal in *Musera vs. Mwechelesi & Another (2007) KLR 159*: stated as follows in regards to appeals:

**“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”**

15. Following the holding in the case cited herein, my role in this appeal, which is a first appeal, is to re-assess and re-evaluate the entire evidence tendered before the trial court and arrive at my own conclusions, while taking into consideration the lower court's exercise of discretion on findings of fact and law.

16. The issues for determination in the appeal are:

- i. Whether the Appellant proved her case on a balance of probability**
- ii. Whether the appellant deserves the remedies sought in her claim and not those awarded by the trial court.**

### **Whether the Appellant proved her case on a balance of probability**

17. On the issue of the burden of proof, it is trite law that he who alleges must prove. The claim subject of this appeal was the Appellant's claim and for this reason she was the burden bearer per Section 107 and 108 of the Evidence Act as well as Section 47(5) of the Employment Act, 2007.

18. Although it is true the Respondents did not defend the suit, this fact did relieve the Appellant of the burden of proof. She had an obligation to prove her case whether or not the suit was defended and that this was the basis for which she testified on formal proof even after an interlocutory judgement had been entered in her favour.

### **Whether the appellant deserves the remedies sought in her claim and not those awarded by the trial court.**

19. The Appellant contends that the trial court ought to have granted her all the prayers she sought in her statement of claim. Amongst the prayers is reinstatement. The Appellant herein was terminated on 12<sup>th</sup> February, 2016 and the judgment was delivered on the 5<sup>th</sup> February, 2021.

20. This was more than four years after the Appellant had been dismissed. Section 12(3)(vii) of the Employment and Labour Relations Court Act, provides as follows in regards to reinstatement:

**“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:**

**(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.”**

21. The trial court correctly held that remedies in cases of unfair termination and/or wrongful dismissal, flow from Section 49 of the Employment Act, 2007. The reasons the trial court listed for declining to reinstate the Appellant are justified reasons and the court declines an invitation to interfere with the decision of the lower court. Moreover, for reason that the Appellant has been out of the Respondents employment for more than three years, this court lacks jurisdiction to make an order for her reinstatement.

22. The court finds and holds that the Appellant was the burden bearer in the matter and which burden she was obligated to discharge so as to proof that she was entitled to the remedies she sought in her claim.

23. This court finds and holds that the Appellant has not proved her grounds of appeal and the court lacks basis upon which to interfere with the judgment of the lower court. **(See Mbogo & another vs. Shah [1968] EA 93 at 96)**

24. The upshot is that the appeal is dismissed.

25. The Appellant shall bear the costs of the appeal.

26. Judgment accordingly.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 11<sup>TH</sup> DAY OF NOVEMBER, 2021**

**CHRISTINE N. BAARI**

**JUDGE**

**Appearance:**

Esther Kabole Ambira- Appellant Present in Person

N/A for the Respondents

MS. Christine Omollo - Court Assistant.