



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. APPEAL E027 OF 2020

(Being an Appeal against the judgment of Hon. E. Wanjala (Ms) S.R.M. delivered on 30/06/2020 in Milimani C.M.E.L Cause No. 1338 of 2019)

JOHN MUNYAO NGUYO.....CLAIMANT

VERSUS

PACIFIC STATIONERS (K) LIMITED.....RESPONDENT

JUDGMENT

1. The Appellant brought this appeal against the decision of the Hon. E. Wanjala (Miss) Senior Resident Magistrate delivered on 30th June, 2020 in Milimani C.M.E.L. Cause Number 1338 of 2019.

2. The appeal is premised on the grounds set out in the Memorandum of Appeal filed on 8th July, 2020 the gravamen of which is as follows:-

- (i) The learned magistrate erred in law and fact by failing to uphold the minimum wage applicable for the appellant.**
- (ii) The learned magistrate erred in law and fact by awarding inordinately low compensation for unfair and wrongful termination considering the circumstances of the case**
- (iii) The learned magistrate erred in law and fact by holding that the Appellant was not entitled to housing allowance.**
- (iv) The learned magistrate erred in law and fact by holding that the Appellant was not entitled to an award for overtime worked despite the uncontroverted evidence and pleadings on record and**
- (v) The learned magistrate erred in law and fact by declining to award the Appellant compensation for worked annual leave days.**

3. This being a first appeal, this Court is guided by the decision in **Selle –vs- Associated Motor Board Co. Limited (1968) E.A. 123** by considering the entire evidence adduced afresh minded that the Court did not directly hear the witnesses for purposes of considering credibility issues. The Court is also minded that it may not set aside the decision of the trial Court on merits and on the awards granted just because it would have arrived at a different decision and that a Court of Appeal is not to interfere unduly with the exercise of discretion by a trial Court unless as guided by established principles.

4. In the present case, the appellant testified as C.W.1 and adopted his witness statement dated 2/8/2019. C.W.1 testified that he was employed by the respondent as a driver on 2/10/2017. C.W.1 testified further that when he started working, there was no agreement on the wage payable, that the respondent just asked him to start working and that his salary would be put in his account. That he was paid Kshs.14,000 the first month. That the salary kept reducing and he was told statutory deductions were made on his salary. That he was driving motor vehicle registration number KAK 956D which had a tare weight without load of 2800 kgs. The claimant produced statements of his account to demonstrate wages paid. C.W.1 testified that on 13/4/2019, he reported to work at 6.00 a.m in the morning and was assigned two turn boys who loaded luggage into the vehicle for delivery at Uthiru. That at Westlands, some luggage was delivered to a customer. The turn boys returned with two boxes of luggage and said the customer had rejected the luggage since it had been tampered with. C.W.1 returned to work and found policemen waiting for them. They were asked to explain what transpired. That C.W.1 and one turn boy by the name Abdallah were arrested and taken to industrial area where they were remanded from Saturday to Monday evening. The 2nd turn boy was arrested also. Upon the release of C.W.1 from custody, he was refused access to the place of work and the employer declined to take his calls. That this is how his employment came to an end.

5. Under cross-examination, C.W.1 stated that his payment was net upon deduction of National Social Security Fund (NSSF) and National Hospital Insurance Fund (NHIF). C.W.1 stated further that he used to drive to Westlands and Uthiru at 6 a.m and closed work at 7 p.m in the evening.

6. R.W.1 testified for the respondent that his name was Bernard Kitavi Ndambuki. That he was an accountant and Human Resource Manager. That he adopted his witness statement dated 8/1/2020 as his evidence in Chief. R.W.1 also relied on list of documents produced. R.W.1 testified that on 13/4/2019, C.W.1 was driving a motor vehicle of the Respondent. That C.W.1 had been instructed to return 5 toners delivered to the respondent in excess of the order. The returned toners were rejected by the supplier because they were found to have been tampered with. R.W.1 stated that C.W.1 was arrested together with the turn boys. R.W.1 stated that it was the responsibility of the driver and turn boys to safeguard the goods. That the matter is still under investigations. R.W.1 denied that C.W.1 was denied access to the company premises. That the services of C.W.1 were not terminated

7. R.W.1 testified under cross-examination that according to the minimum wage guidelines, the minimum wage payable to C.W.1 as a light van driver was Kshs.17,000. R.W.1 stated that when C.W.1 was employed, he drove a heavy commercial vehicle. R.W.1 stated that the salary of C.W.1 was paid vide Equity bank account.

8. The respondent stated that C.W.1 deserted work but was not dismissed from employment. The learned magistrate in his considered judgment summarized the evidence adduced by C.W.1 and R.W.1 as captured in his judgment. The learned magistrate analysed the testimony by C.W.1 and R.W.1 and the law applicable and in particular Sections 43, 45(2) and 47(5) of the Employment Act, 2007 and the case of **Swalahdin Abound Mohammed –vs- Tahmeed Coach Limited (2019) eKLR** to reach a finding that the respondent had failed to demonstrate that C.W.1 had deserted duty and what steps they took against C.W.1 upon the alleged desertion. The Court found that the respondent had unlawfully dismissed C.W.1 from employment by denying C.W.1 access to the work place upon his release from the police cells. The Court found that the respondent had not proved it had valid reasons to dismiss C.W.1 from work.

9. This Court does not find reason to fault the decision by the learned magistrate on the facts of the case and the law applicable. The Court upholds therefore the decision by the learned magistrate that the Respondent unlawfully and unfairly dismissed C.W.1 from employment.

10. With regard to the reliefs sought by the Appellant, the Court considers them seriatim as follows:-

(a) Minimum wage

The trial magistrate found that the appellant earned Kshs.17,500 at the time of his dismissal. That the claimant relied on Legal Notice No. 112 of 2017 and Legal Notice No. 2 of 2019 respectively to assert that as a driver of a heavy commercial vehicle, he ought to have been paid Kshs.23,039.40 and not 17,500,

The trial Court found that the appellant was paid Kshs.2,283, as house allowance in addition to the basic salary of Kshs.17,500, hence gross salary of Kshs.19,783.

11. The trial magistrate went ahead to find that the appellant signed for the said salary and raised no issue with it and therefore he was in agreement with the payment and cannot be heard to complain that he was underpaid. The magistrate declined to make any award for underpayments accordingly.

12. The reasoning by the magistrate was faulty and not supported by statutory law applicable.

13. In **Nicholas Juma Ojuok –vs- Pentagon Elite Security Services Limited [2018 eKLR, Rika, J.]** stated:-

“The Court’s view is that parties cannot agree to pay and receive monthly salaries, below the minimum wage set by the law..... Terms and Conditions of service which fall below the minimum statutory standards are, illegal and unenforceable. Section 27 of the Employment Act, and regulations made under and other written laws, such as wage Regulations made under Section 63 of the Labour Institutions Act, 2007, constitute minimum statutory standards. Parties cannot contract below these standards. Section 48(2) of the Labour Institutions Act, states where a contract of employment provides for less remuneration, remuneration and conditions of employment established by the wages order shall be inserted in the contract, in substitution of those terms. An Employer cannot offer; and an Employee cannot legally accept, and be bound by an offer of terms and condition of service below the statutory minimum standards.”

14. This Court is in full agreement with the aforesaid pronouncement of the principles of law applicable with regard to contracts of employment. These contracts are regulated and modified by statutory provisions under the Employment Act, 2007, the Labour Institutions Act, 2007 and the wage Regulations made pursuant therefrom.

15. Accordingly, the minimum wage applicable to the appellant for the period 2017 to 2019 was that provided in the Regulation of wages (General) Order No. 112 of 2017 and No. 2 respectively.

16. In terms thereof the appellant being a driver of (medium sized vehicle) which is one of over 2 tonnes and less than 8 tonnes with or without trailer and in possession of a driving licence for that class of vehicle was entitled to a basic salary and house allowance prescribed in the respective general wage orders.

17. The appellant adduced documentary evidence to show that he was paid Kshs.86,365 over a period of 7 months between 21/10/2017 and 30/4/2018 when legal notice number 112 of 2017 was in force.

18. The minimum wage applicable to the appellant during this 7 months period was Kshs 21,942.30. The claimant was paid Kshs.14,000 during this period. The Court upholds payment of the difference in payment made by the respondent to the appellant less statutory payments.

19. For the period 1/5/2018 to 13/4/2019; the Legal notice applicable was No. 2 of 2019, which provided a minimum basic salary of Kshs 23,039.40. The claimant was paid Kshs.17,500 during this period. The Court finds that the appellant is entitled to the payment of the difference for the period applicable less statutory payments which should be remitted accordingly.

(b) Housing allowance

20. The aforesaid amounts payable to the appellant ought to also reflect 15% housing allowance component. The housing allowance payable in terms of this judgment shall exclude the amount of house allowance already paid to the appellant by the respondent from the date of employment to the date of termination.

(c) Overtime

21. The claimant sought to be paid overtime at the rate of 1.5 times for the period worked in excess of 8 hours per day in terms of Rule 6 of the Regulation of Wages (General) order and the Employment Act, 2007. The appellant testified under paragraph 10 of the witness statement that he worked from Monday to Saturday and reported at 7 a.m at Westlands Peponi Road office and would be at Respondent's Industrial area office at 8 a.m. That he would then proceed for deliveries until 5pm in the evening and return the vehicle at Westlands office where it would park.

22. The appellant stated that he did not break for Lunch, since lunch hour found them on transit. The period of between 7 am and 5 pm translates to 9 hours a day and therefore one (1) hour overtime per day. This testimony was not contradicted by R.W.1. Whether or not the appellant took break for lunch is not a matter that was sufficiently proved before the trial Court. This Court finds that the trial Court erred in not finding that the appellant was entitled to payment of overtime at the rate of one (1) hour per day for the entire period worked by the Appellant from 2nd October, 2017 to 13th April, 2019. The Court awards the appellant accordingly.

(d) Leave days

23. The appellant did not adduce any evidence before Court verbally and or as contained in the adopted witness statement with regard to the matter of leave days not taken and for non-payment in lieu of leave. The Court finds that the appellant did not prove that he was entitled to payment in lieu of leave days not taken and the Court upholds the decision of the learned trial magistrate in this respect.

(e) Compensation

24. An award for compensation in respect of employment matters is guided by Section 49(1) (c) read with subsection (4) thereof. As guided by the Supreme Court of Kenya in the case of **Kenfright (E.A.) Limited –vs- Benson K. Nguti**. The Court said:-

“We have no doubt that once a trial Court finds that a termination of employment was wrongful or unfair, it is only left with one question to determine, namely- ‘what is the appropriate remedy.’

The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder.”

25. The Court went on to state:-

“This Court has in its previous decisions cautioned itself against interference with the superior Court's exercise of jurisdiction in a number of decisions.”

26. The learned trial magistrate did not refer to the provisions of Section 49(1) (c) and (4) in awarding the Appellant 3 months' salary as compensation for the unlawful and unfair dismissal. The exercise of discretion under Section 49 is guided by the thirteen (13) listed considerations under Section 49(4) of the Act. Failure by the trial Court to apply the said considerations in exercise of its discretion to determine the level of compensation as guided under Section 49(4) renders the award, arbitrary, non-judicial and therefore subject to be set aside. In the present case, the appellant had served the respondent for a period of two (2) years and six (6) months. The appellant had no disciplinary record prior to the dismissal and so did not contribute to it. The appellant wished to continue working for the respondent but was denied access to the premises upon being falsely accused of theft by the respondent, arrested, detained for a whole week and not subjected to any charges or criminal trial. These are gross aggravating circumstances. The Appellant lost his source of income without notice and was not compensated for the loss. The Appellant was not paid terminal benefits upon the wrongful dismissal. The Appellant was not granted a Certificate of Service to help him get an alternative employment. The respondent pressed a counter claim against the Appellant which was found to be without merit and therefore not granted. Considering the **Kenfreight case** above, in which the Court upheld a grant of a maximum of 12 months' salary in compensation, the Court awards the appellant the equivalent of six (6) months' salary in compensation at the rate of 26,494.85 being gross pay payable per month comprising basic pay and house allowance.

27. In the final analysis, Judgment is entered in favour of the Appellant as against the respondent in the following terms:-

(a) The judgment by the trial Court is set aside and substituted with an order for payment of Kshs 26,494.95 in lieu of one month notice.

- (b) Kshs 11,481 being 13 days arrear salary for April, 2019.
- (c) Ksh 55,280 being unpaid house allowance for the period worked at the rate of Kshs 3,455.85 per month.
- (d) Kshs 158,966 being the equivalent of six months' salary in compensation for the unlawful and unfair termination.
- (e) Issuance of Certificate of Service within 30 days of this judgment and:-
- (f) The award is payable with interest at Court rates from date of judgment till payment in full.
- (g) Costs of the suit in the Court below and at this Court.

DATED AND DELIVERED (VIRTUALLY) AT NAIROBI THIS 9TH DAY OF DECEMBER, 2021

MATHEWS N. NDUMA

JUDGE

Appearances

Elmer & Company Advocates for the Appellant

Albert Kamunde & Co. Advocates for the Respondent

Ekale – Court clerk.