



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

ELRC APPEAL NO. E017 OF 2021.

DPL FESTIVE LIMITED..... APPELLANT

VERSUS

ELIJAH OCHIENG RAKURU.....RESPONDENT

(Being an appeal from the Judgment and Decree of the Chief Magistrate

Court – Kisumu by Hon. R. K. Ondieki SPM and delivered on the 27th April, 2021 in

CMEELRC Cause No. 57 of 2020)

JUDGMENT

1. The Appellant lodged this appeal seeking orders that the Judgment of the Trial Magistrate delivered on 27th April, 2021, be set aside and the same be substituted with an order dismissing the suit.
2. The Appellant had earlier not entered appearance and an Interlocutory judgment was entered against them on 25th June, 2020, which judgment was set aside through a consent entered into on similar date and filed in court on 14th July, 2020.
3. The court delivered judgment on the matter on the 27th April, 2021, wherein the learned Magistrate entered judgment in favour of the Respondent against the Appellant in the following terms:

“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

Having found the termination of the Claimant unfair for want of both valid reasons and fair procedure, he is entitled to prayers sought and I enter judgment for Claimant against the Respondent in following terms;

a) Three months ‘salary at Kshs. 19400/= per month Kshs 58,200/=.

b) Damages of 12 months’ salary.... Kish. 232,800/=

c) House allowance of Kshs 8,890.67.

Total Kshs. 299,890.67

I shall also award costs and interest at the court rates.”

4. The Appellant was dissatisfied with the decision of the court and filed a Memorandum of Appeal on the 25th May, 2021, premised on the following grounds:

- i. The Learned Trial Magistrate erred in fact and law in failing to find from evidence on record that there was a document of engagement that regulated the terms and conditions of service between the Appellant and the Respondent.
- ii. The Learned Trial Magistrate erred in fact and in law by totally ignoring the effect of the contract of service as the document to give effect to in construing the terms and conditions of service.

- iii. The Learned Trial Magistrate erred in fact and in law by failing to take into account the terms and conditions of service with specific reference to Notice period as well as Housing Allowance.
- iv. The Learned Trial Magistrate erred in law by failing to appreciate the mitigating factors in respect to the circumstances under which the service contract was determined.
- v. The Learned Magistrate misdirected himself in making a finding that there was termination of employment at the instance of the Appellant as opposed to desertion of work at the instance of the Respondent.
- vi. The Learned Magistrate erred in law in the evaluation of evidence and the effect of the principle of the balance of probability in relation to managing desertion of work.
- vii. The Learned Trial Magistrate erred in fact and law by failing to appreciate the evidence tendered by both the Appellant and the Respondent and analyze and apply the correct law thereby arriving at erroneous conclusion that is not premised on evidence and the law in respect to management of separation on service contract to wit *Section 41 and 45 Employment Act, 2007*.

5. Parties canvassed the Appeal through written submissions. Both parties filed their submissions.

The Appellant's Submissions

6. The Appellant submitted that the trial court failed to evaluate the terms and conditions of service with respect to the instrument of engagement, which in the instant case is the letter of appointment. It is submitted that this letter was exhibited by both parties and was thus undisputed and further that it was a term of that letter that remuneration will include a house allowance, 21 days leave per year and a one month notice period for either party to terminate the contract of employment.
7. The Appellant submitted that the trial court had no basis to make a finding that the Respondent was entitled to 3 months salary in lieu of notice and further, that he was not entitled to house allowance, when all the exhibited pay slips indicated that the Respondent earned a house allowance.
8. It is submitted for the Appellant that the trial court erred by holding that the Respondent was indirectly terminated, while the evidence on record indicate that he had deserted duty and that he told the court that he did not report to work from 28th January, 2019 and did not inform the Appellant. The Appellant submits that if indeed this was the case, why did the trial court not give a relief for constructive dismissal and added that the Respondent did not lead any evidence to prove constructive dismissal.
9. The Appellant prays that this court in exercise of its appellate jurisdiction evaluates the pleadings and the evidence as captured, and allow the appeal by setting aside the judgment of the lower court and substitutes the same with an order dismissing the suit.

The Respondent's Submissions

10. It is submitted that the process of dismissing the Respondent was contrary to the law and amounted to unfair termination and that the trial court did not err in finding the Respondent's termination unfair.
11. The Respondent submitted that the Appellant failed to prove that there were valid reasons for terminating him and urged that the court dismisses the appeal with costs.

Determination

12. The appeal herein is premised on seven grounds, but which grounds are repetitive and the same are condensed as follows:

- i. That the trial court did not evaluate the terms and condition of service with respect to the instrument of engagement which is the letter of appointment.
- ii. The trial court did not evaluate termination of employment on account of desertion with reference to the Respondent's testimony made before court and on oath.

13. 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."

14. 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 conclusion, while taking into consideration the lower court's exercise of discretion on findings of fact and law.

15. Arising from the grounds of appeal, the following are the issues for determination:

1. Whether the trial court based its decision on evidence before it
2. Whether the Respondent deserves the reliefs awarded by the trial court
3. Who bears the costs of the appeal and the suit before the lower court

Whether the trial court based its decision on evidence before it

16. The Appellant submitted that the trial court ignored the appointment letter subject of this matter, which letter provided the terms and conditions of service between the parties. In this regard, the Appellant challenged the lower's court's award of 3 months' salary in lieu of notice, when the letter appointing the Respondent to the service of the Appellant, clearly provides a notice period and which period is 1 month and not three months.

17. The letter of appointment referred to herein is dated 1st October, 2017. Its paragraph 8, reads that **“Either party can terminate their services by giving 1 month notice or pay 1-month salary in lieu of notice.”**

18. Section 10 (3)(b) of the Employment Act, 2007, allows parties to a contract of service the latitude to agree on the length of notice which the employee is obliged to give and entitled to receive, in order to terminate a contract of employment.

19. The parties herein had expressly agreed on a 1 month notice and which period is captured under their contract of service, which is the appointment letter. I find and hold that the trial court erred in awarding the Respondent a 3 months' salary in lieu of notice contrary to the provision of his contract. The award of 3-month salary in lieu of notice is set aside.

20. The Appellant has also challenged the lower court's decision to award the Respondent a house allowance. The Appellant's assertion is that the Respondent's pay slips produced before this court indicate that he was paid a house allowance together with salary.

21. The Respondent's pay slips before court, including for the month of January, 2019, indicate that he earned an amount of Kshs. 3,076/- listed in the said pay slips as a housing allowance.

22. Payment of a house allowance is a Statutory requirement and employers are bound by *Section 31 (1) of the Employment Act, 2007*, to either provide an employee reasonable housing accommodation or pay the employee sufficient housing allowance as rent in addition to the basic salary.

23. The pay slips submitted in evidence before the trial court and which form part of the record of appeal before this court, are sufficient proof that the Respondent was paid house allowance for the months his salaries were remitted. I agree with the assertions of the Appellant, that the lower court had no basis upon which to make an award for house allowance and the same is set aside.

24. On the issue of how the Respondent left the service of the Appellant, the Appellant submitted that the Respondent deserted duty on the 28th January, 2019. The Respondent told the trial court that he was taken ill and while on sick leave, the Appellant failed to pay his salary.

25. It was the Appellant's evidence that they sent the Respondent letters through another of their employee, who lived in the same neighbourhood as the Respondent. The employee referred herein was not called to prove that indeed the Respondent absconded duty or that he received notices from the Appellant and failed to show up at work or respond to the letters.

26. There is no evidence to prove that the Respondent was given a fair process and that he left the Appellant's employment out of his own free will. Further, the assertion by the Appellant that the Respondent was not given sick leave because he presented copies instead of original hospital discharge forms, is a lame excuse not to pay the Respondent his full salary.

27. This court returns that the Respondent may have deserted duty as admitted, but that he did so out of frustrations caused by the Appellant during a time when he was ill and could not work. The leave form produced in evidence included a comment by the approving officer to the effect that the Respondent **“is ill and too weak”**. The leave was approved from 8th December, 2018 to 3rd January, 2019. The Respondent resumed duty and is said to have worked until 28th January, 2019. His salary for November and December, 2018 and January, 2019, was paid, less the days he was either on official leave or in hospital.

28. I conclude by holding that the Appellant did not take the Respondent through fair process and the termination is declared both procedurally and substantively unlawful and unfair. I uphold the holding of the trial court in this respect.

29. The trial court awarded the Respondent 12 months' salary in compensation for unfair termination. No reasons were given to justify this award. The Respondent though treated unfairly, chose to desert duty instead of raising the issues affecting him, with the employer/Appellant while still on duty. The Court of Appeal addressed the issue of awards in the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro Civil Appeal No. 42 of 2015**, where the court held:

“remedies for unfair termination is provided for in section 49 of the Act. They include, payment equivalent to a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employees at the time of dismissal. In deciding whether to adopt some of the remedies, the court has to take into account a raft of considerations such as

the conduct of the employee, which to any extent caused or contributed to the termination.”

30. I find that the Respondent majorly contributed to his termination and being guided by the provisions of *Section 49 of the Employment Act*, I set aside the award of 12 months in compensation for unfair termination, and substitute the same, with an award of 6 months' salary as compensation for unfair termination.

31. The upshot is that the judgment of the trial court is set aside and the appeal allowed in the following terms:

i. That the award of 3 months' salary in lieu of notice is set aside and replaced with a 1-month salary in lieu of notice.

ii. The award of house allowance is set aside.

iii. The award of 12 months' salary in compensation is set aside and replaced with a 6 months' salary in compensation for unfair termination.

32. This appeal has partially succeeded and for this reason, each party shall bear their own costs of the appeal.

33. I will not disturb the award of costs given by the trial court.

34. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 2ND DAY OF DECEMBER, 2021.

CHRISTINE N. BAARI

JUDGE

Appearance:

Mr. Ouma present for the Appellant

Mr. Rakewa present for the Respondent

Ms. Christine Omollo - Court Assistant.