



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO.E043 OF 2021

MOKI MUTHYA.....APPELLANT

VERSUS

KITUI FLOUR MILLS LIMITED.....RESPONDENT

(Being an appeal from the judgment of Hon. M. Nabibya, PM

delivered on the 17th June 2021 at Mombasa CM ELRC No. 167 of 2018)

J U D G M E N T

1. The Appellant herein was the Plaintiff in Mombasa Chief Magistrate’s Court Case No. 167 of 2018, whereas the Respondent was the defendant. Vide an amended plaint dated 16th September 2019 and filed in court on the same date pursuant to leave granted by the Court in that regard on 20th June 2019, the Appellant pleaded as follows:

- a) that he was employed as a lorry driver by the Respondent in November 2016, earning a monthly salary of ksh.27,982.
- b) that without notice or payment in lieu thereof, and without being accorded leave or compensation in lieu thereof, without the Appellant being accorded an opportunity to be heard, and without any justifiable cause, the Respondent terminated the Appellant’s employment on 31st May 2018.
- c) that the termination was unfair and violated the principles of natural justice as well as the provisions of Sections 41,43,45 and 49 of the Employment Act No. 11 of 2007, ILO convention on termination of employment 1982 and Article 41(1) of the Constitution of Kenya.
- d) that the Appellant has a right to protection against unemployment and undignified life.

2. The Appellant sought the following reliefs:-

- a) one month salary in lieu of notice.....Ksh.27,982
- b) leave payment for one year (21x933).....Ksh,19,587
- c) compensation for unfair termination
12 monthsX27,982.....Ksh.335,784
- d) years of service pay (15 days x1 years).....Ksh.13,995
- TotalKsh.397,995**

3. The Appellant further pleaded that he had an accident on 21st May 2018 while in the cause of employment and that when he reported back upon recovery, he was told to surrender company property as there was no longer work at the Respondent Company.

4. The Appellant filed a witness statement signed by himself together with the amended plaint on 16th September 2019, which, to a great extent, replicated the averments made in the amended plaint. The Appellant had earlier on filed a list of witnesses and a list of documents, listing some five documents. Both lists were filed on 24/8/2018.

5. The Respondent filed a further amended statement of defence dated 8th October 2019, denying the averments made in the Appellant's amended plaint and putting the Appellant to strict proof thereof.

6. The Respondent further pleaded:-

a) that it had employed the Appellant at a basic salary of Ksh.27,173, inclusive of house allowance.

b) that the Respondent lawfully terminated the Appellant's employment for poor performance vide a letter dated 31st May 2018 which contained reasons for termination of the appellant's services.

c) that the Appellant's services were lawfully and justifiably terminated for wilful and continuous poor performance, which caused the Respondent massive financial losses and loss of business.

d) that the Respondent paid the Appellant ksh.27,173 being one month notice and ksh.7,075 being nine days leave due.

e) that the Respondent had given the Appellant numerous opportunities to be heard.

f) that the Appellant was not entitled to service pay as he was a registered member of NSSF, and the Respondent remitted all deductions from the Appellant's salary to the fund; and had complied with the Employment Act 2007.

g) that before termination, the Respondent had assigned the Appellant motor vehicle Registration No. KCM 485N Mercedes Benz as its sole driver, which motor vehicle was written off in a self involving accident at Bachuma along Mombasa – Nairobi road on 21st May 2018.

h) that the Appellant's suit was scandalous, frivolous, vexatious, an abuse of the Court's process and did not disclose a reasonable cause of action against the Respondent.

7. The Respondent is shown to have filed two witness statements on 19th June 2019, by Abdalla Bajaber and Said Ahmed Taib respectively, a list of witnesses and a list of documents, both dated 19th June 2019.

8. When the suit came up for hearing on 23rd September 2020, the Appellant adopted his recorded and filed witness statement as his evidence in Chief and his (filed) documents as exhibits. He further testified that he was not given any notice and no disciplinary meeting was called. He sought reliefs as prayed in his claim.

9. Under cross examination, the Appellant denied having received any letter from the Respondent, either on 1/8/2017, 11/12/2017 or 31/5/2018. He admitted having been paid ksh.24,000 after deductions, but not ksh.32,438. He denied either reporting to work late or having received any warning. The Appellant closed his case and counsel for the Respondent requested for adjournment in order to call two witnesses.

10. The Respondent never called any witness. On 23rd March 2021, Counsel for both parties consented to admission of the Respondent's two witness statements and documents filed on 9th June 2019 as defence evidence. Thereafter, counsel filed their respective submissions and the Court delivered its judgment on 17th June 2021, dismissing the Appellant's suit with costs to the Respondent.

11. In dismissing the Appellants claim, the learned magistrate rendered herself as follows:-

“the Respondent's response was filed on 21/3/2019 in which any wrong doing was cleared. The two accompanying statements and documents were admitted by consent. The statement by Said Ahmed Taib indicated that the allegation that the motor vehicle KCM 845N was not mechanically (sic) as false since it was regularly serviced and so, the motor vehicle inspection found it to have no pre-accident defects. That even after the accident, the Claimant did not report to his employer who first learnt from other motorists. That he had been not a careful driver and had driven for 9 hours from Mombasa to Makinon which showed lack of commitment. That he was ever warned under letter of 1/8/2017 about being late at work and one dated 22/11/2017 on careless driving. That upon termination, he was paid ksh.34,284 to cater for notice and 9 days due leave. The statement of Abdalla Bajaber added voice to that of Said Ahmed (emphasis mine). Documents produced were motor vehicle inspection report, job card, letters dated 31/5/2018, 1/8/2017, 22/11/2017, petty cash voucher dated 5/6/2018, leave card and payslip for April 2018. For the plaintiff, a police abstract, P3 Form, treatment notes, receipts and a demand notice as exhibits.

...there is also no doubt warning letters were send to the Claimant before termination, reminding him of various issues which included but not limited to not taking work seriously. He did confirm during cross examination that the accident occurred when the car in front stopped abruptly, it means, he was driving too close and at a speed which I think was not reasonable in the circumstances. Otherwise, he would have been able to stop or otherwise control his motor vehicle. He also took too much time driving from Mombasa – Makinon which was just 100Km part. I feel this was unreasonably slow.

... I also presume that his dismissal was summary in nature, since the conduct of the claimant was that of a care free. It is the duty of an employee to remain truthful to his work responsibilities which include but not limited to report accidents and/or avoid those that are avoidable. The Claimant does not demonstrate that he was a serious employee at all and I term the termination fair. I therefore dismiss the claim, costs to the respondents”.

12. The Appellant has appealed against the judgment and has set forth the following grounds of appeal:-

- a) that the learned trial magistrate erred in both fact and Law in making a presumption that the Claimant’s dismissal was summary in nature since the conduct of the claimant was carefree.
- b) that the learned trial magistrate erred in both law and fact in presuming that since the claimant did not demonstrate that he was a serious employee, his termination was fair.
- c) that the learned trial magistrate erred in fact and in law in dismissing the Claimant’s claim in its entirety without taking into consideration the following factors:-
 - (i) the claimant had not been given notice prior to his dismissal.
 - (ii) the claimant was not informed of the charges the employer had contemplated before his dismissal.
 - (iii) whether the said charges (if any) constituted a fair and valid reason.
 - (iv) whether the claimant was given an opportunity to present his case.
 - (v) whether the claimant was accorded a hearing and was accompanied by a fellow employee during such hearing.
- d) that the learned trial magistrate erred in law and fact in dismissing the claimant’s claim for notice pay, leave and service pay yet no evidence of payment was availed neither were NSSF remittance slips availed.
- e) that the learned trial magistrate erred in law and fact in considering extraneous factors that were unsupported by evidence (and) consequently arrived at an unjust decision.

13. This is a first appeal. As stated by the Court of Appeal in the case of Jacob Oriando Ochanda –vs- Kenya Hospital Association t/a Nairobi Hospital [2019] eKLR, it is this Court’s primary duty to re-evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law. See also Abok James Odera t/a A.J. Odera & Associates –vs- John Patrick Machira t/a Machira & Co. Advocates, Court of Appeal Civil Appeal No. 161 of 1999.

14. For record purposes, I must point out that where a witness has filed a witness statement, such statement cannot be admitted in evidence by consent of counsel. Such statement, though filed in Court, is not evidence, and does not become evidence unless and until the witness who recorded and signed it adopts the same as his or her testimony/evidence during trial, and on oath. The situation would be different if a party files an affidavit instead of a statement, as affidavits are statements on oath and are, indeed, evidence.

15. Rule 14(4) of the Employment and Labour Relations Court (Procedure) Rules, 2016 provides as follows:-

“pleadings may contain evidence; provided that the Court may require the evidence to be verified by an affidavit or sworn oral evidence”.

16. Under Rule 15 of the Employment and Labour Relations Court (Procedure) Rules 2016, one of the issues to be ascertained during a scheduling conference is whether evidence is to be oral or by affidavit.

17. It may be argued that the Employment and Labour Relations Court (Procedure) Rules 2016 govern proceedings in this Court only, but not in the subordinate Courts. The Civil Procedure Rules do not provide for production of witness statements by counsel, either by consent or otherwise. Order 18 Rule 2 (1)(2) provides as follows:-

“unless the Court otherwise orders:-

(1) on the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues that he is bound to prove.

(2) the other party shall then state his case and produce his evidence, and may then address the Court generally on the case. The party beginning may then reply.”

18. Order 18 Rule 3 of the Civil Procedure Rules provides:

“the evidence of the witness in attendance shall be taken orally in open Court in the presence of and under the personal direction and superintendence of the judge.”

19. Admission of recorded witness statements as evidence in the absence of the defence witnesses “**by consent of counsel**” and production or admission of defence documentary evidence in the absence of defence witnesses “**by consent of counsel**” was an illegality. Consent by counsel or by parties to a suit cannot oust the law. The Court’s reliance on illegally admitted or produced defence witness statements was a further illegality. It is to be noted that no explanation was given to the Court as to why the two defence witnesses were not in Court.

20. The issue of invalidity or illegality of “**production**” of the Respondent’s witness statements and documentary evidence before the trial Court has not been raised on appeal.

21. Parties herein did not file any statement of agreed issues for determination. In their respective written submissions, however, parties framed separate issues for determination as follows:-

(a) The Appellant

(i) Whether the Claimant’s termination was unfair.

(ii) Whether the Claimant is entitled to the reliefs sought.

(b) The Respondent

(i) Was the termination of the Plaintiff fair.

(ii) Whether the plaintiff is entitled to compensation.

22. From the foregoing, and upon considering the pleadings filed and evidence adduced before the trial Court, as well as the separate issues framed by the parties in their respective submissions before the trial Court, issues for determination appear to me to be as follows:-

a) whether termination of the Appellant’s employment was based on valid reasons.

b) whether termination of the Appellant’s employment was fair and lawful.

c) whether the Appellant is entitled to the reliefs sought.

23. On the first issue, the claimant did not produce any dismissal letter. According to the evidence adduced by the claimant, his dismissal was done orally. He testified that on 31st May 2018, he was told to go away as there was no work in the Respondent company. He denied receiving any letter on 31st May 2018 or on any other day. On its part, the Respondent filed some three letters, dated 31st May, 2018, 1/8/2017 and 22nd November 2017. The three letters are part of the Respondent’s documents that were on 22/3/2021 admitted as defence evidence by consent of both counsel.

24. It is worth noting that none of the said three letters is shown to have been served on and/or delivered to the Claimant. The Respondent did not call any witness and therefore no evidence was tendered on whether or not the said letters were received by the Appellant. The Appellant denied receiving any of them.

25. The letter dated 31st May 2018 was purported to be a dismissal letter, and it states in part:-

“the management has evaluated your performance. Your situation show(s) a constant decrease in your performance as a company driver and this does not count well to fulfil the necessary demand to counter our competitors.

Therefore your contract as a driver has been terminated with effect on (sic) 31st May 2018”.

26. The Respondent did not demonstrate, either by evidence or otherwise, whether the allegation of “decrease in performance” on account of which the Appellant’s contract of employment was terminated was valid.

27. Section 45(1) of the Employment Act provides:

“no employer shall terminate the employment of an employee unfairly”.

Section 45(3) (a) of the said Act provides:-

“termination of employment by an employer is unfair if the employer fails to prove:-

(a) the reason for the termination is valid.

(b) that the reason for the termination is a fair reason:-

(i) related to the employee's conduct, capacity or compatibility or

(ii) based on the operational requirements of the employer; or

(c) that the employment was terminated in accordance with fair procedure.

28. Section 43 of the Employment Act provides:-

(1) "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.

(2) the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the service of the employee".

29. The Respondent did not prove the truth and/or validity of the allegation of "constant decrease in performance as a company driver."

30. Although the Respondent had pleaded the occurrence of a self-involving road accident on 21st May 2018 involving the Respondent's lorry that was being driven by the Appellant, and which the Respondent blamed on the Appellant while the Appellant blamed it on another driver whom he accused of breaking abruptly, no evidence was adduced by the Respondent to show that the accident in issue was caused by the Appellant. Further, the said accident is not mentioned in the purported dismissal letter dated 31st May 2018, and nothing was placed before the Court to show that it was caused by the Appellant.

31. I find and hold that termination of the Appellant's contract of employment by the Respondent was not based on valid reasons.

32. Regarding the alleged warning letters dated 1st August 2017 and 22nd November 2017, and which are not shown to have been received by the Appellant in any way, it ought to be noted that a warning letter issued by an employer and served on an employee is taken as a full disciplinary action. In the case of **Dr. Joseph Maingi Maitha -vs- Permanent Secretary Ministry of Medical Services & Another [2015] eKLR**, it was held that once some form of disciplinary action is shown to have been taken against an employee, offences forming the subject matter of the concluded disciplinary process cannot be used against the employee at a future date. An employer cannot, therefore, use warning letters as a basis for terminating an employee's contract of employment.

33. On the second issue, the Appellant pleaded and testified that his employment was orally terminated without notice on 31st May 2018. The Respondent filed in Court a letter dated 31st May 2018, which was later admitted in evidence by consent of both parties. The said letter states that the Appellant's employment was terminated by the Respondent on the date of the letter. Section 41 of the Employment Act 2007 provides:-

"subject to Section 42(1) an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice present during this explanation.

2. notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

34. The Respondent's dismissal of the Appellant on 31st May 2018 did not meet the procedural fairness test set in Section 41 of the Employment Act 2007. The Appellant was not given notice of termination, was not given the reasons on the basis of which the Respondent was considering termination, and in the presence of a fellow employee or shop floor union representative of his choice, and was not given an opportunity to make representations or to state his case. I find and hold that the termination of the Appellant's employment was unfair and contravened the provisions of Section 41 of the Employment Act. It was unlawful.

35. The Court of Appeal held as follows in the case of **National Bank of Kenya -vs- Samuel Nguru Mutonya [2019] eKLR**:

"... termination followed without notice or hearing of the Claimant on the basis that his poor performance had formed the basis of his termination. It is not sufficient that the Respondent was willing to pay in lieu of notice. Before the question of notice payment became ripe, the Claimant should have been given a hearing when his performance was found to warrant a subject for his dismissal. To move and terminate without giving regard to Section 41 of the Employment Act and its provisions, giving the Claimant a hearing in the presence of his representative, the termination became procedurally unfair..."

Where an employer fails to abide with the procedural requirements of Section 41 of the Employment Act, even where payment in lieu of notice is made immediately, such does not cure the procedural unfairness visited upon the claimant...

The Respondent failed to meet the provisions of Section 45 of the employment Act. The claimant is therefore entitled to remedies sought."

36. Before addressing the third issue, I turn to the grounds of appeal set out in the Memorandum of Appeal. The trial Court abdicated its role

as a trial Court by failing to pick out the issues for determination from the pleadings and evidence before it and making a determination thereon. The trial Court erred by making presumptions and proceeding to consider extraneous issues which were outside the pleadings filed, leaving out the real issues that the Court ought to have determined.

37. On the reliefs available to the Appellant, I make a finding that the Appellant was on 5/6/2018 paid ksh.34,248 made up of one month salary in lieu of notice and Ksh.7,075 being payment for nine(9) leave days. A petty cash voucher in this regard was among the Respondent's documents admitted by consent of both counsel. The Appellant admitted, under cross examination, that he received ksh.24,000 after deductions.

38. The Appellant is entitled to compensation for unlawful termination of employment. The Appellant is not entitled to service pay as he was a member of National Social Security Fund (NSSF) into which contributions were made for the Appellant's benefit in accordance with the law governing the fund. A copy of the Appellant's payslip for April 2018 was among the Respondent's documents produced in evidence by consent of both counsel.

39. Consequently, I hereby set aside the lower Court's judgment dated 17th June 2021 and substitute it with judgment in favour of the Appellant for ksh.271,730 being ten months salary as compensation for unfair termination of employment. The Appellant is also awarded costs of the appeal and of the suit in the Court below.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF DECEMBER 2021

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on 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.

AGNES KITIKU NZEI

JUDGE

In the presence of

Miss Onkoba for Appellant

Mss. Miss Ondieki for Respondent