



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

**CIVIL APPEAL NO 13 OF 2019**

**JOSCARLOS ABUKUSE OBAGA.....APPELLANT**

**VS**

**GLOBAL CARGO MOVEMENT LTD.....RESPONDENT**

*(Appeal from the judgment of Hon A.S Lesootia, PM dated and delivered on 4<sup>th</sup> June 2019*

*in*

*Mombasa CMCC ELRC No 234 of 2018)*

**JUDGMENT**

1. On 4<sup>th</sup> June 2019, **Hon A.S Lesootia, PM** dismissed the Appellant’s claim and the Respondent’s counterclaim with no order for costs.
2. Being dissatisfied with the decision of the learned trial Magistrate, the Appellant filed this appeal. In his Memorandum of Appeal dated 3<sup>rd</sup> July 2019, the Appellant cites the following grounds:
  - a) The trial court dismissed the Appellant’s claim without considering the applicable law;
  - b) The trial court failed to make a finding on the pleaded underpayments, the court thus erred and reached the wrong conclusion;
  - c) The trial court failed to find and award unpaid salaries for the months of June and July 2017;
  - d) The trial court erred in law and fact by making a finding that the Claimant’s termination by way of summary dismissal was proper and justified;
  - e) The trial court erred in law and fact by dismissing the Claimant’s claim for public holidays worked and compensation for unfair termination without any proper justification.
3. This being a first appeal, I am required to re-evaluate and reconsider the evidence adduced before the trial court and reach my own conclusions, taking into account that I had no chance to observe the demeanour of the witnesses (see **Peter M. Kariuki v Attorney General [2014] eKLR** and **Easy Coach Bus Services & another v Henry Charles Tsuma & another (suing as the Administrators and Personal Representatives of the Estate of Josephine Weyanga Tsuma (Deceased))[2019] eKLR**).
4. In his claim before the trial court, the Claimant sought the following remedies:
  - a) One month’s salary in lieu of notice.....Kshs. 33,544
  - b) Compensation for wrongful termination.....402,528
  - c) Unpaid arrears for June 2017.....23,544
  - d) Unpaid salary for July 2017.....33,544
  - e) Underpayments from Jan-Jun 2017.....81,266

f) Public holidays worked (6 days).....15,482

g) Overtime worked (to be assessed)

5. After hearing the parties, the learned trial Magistrate drew the following conclusions:

***“The claimant did not deny receipt of letter dated 28<sup>th</sup> July 2017. From the wording of the letter above, the respondent communicated its intentions to take disciplinary action against the claimant. It clearly explained to the claimant that there were reasons to believe the claimant was to be blamed for the accident and invited the claimant to explain why he should not be held responsible for the accident. There is no evidence that the claimant responded to the letter. To that extent I’m satisfied that the respondent partially complied with the requirement set out under S. 41 of the Employment Act by issuing the claimant reasons (sic) for intended dismissal.....the respondent claims that the claimant caused an accident of a vehicle he was assigned, (sic) that the accident was as a result of the claimant’s fault of recklessly parking the vehicle on a hilly spot which was not a designated parking area and further that the claimant left the vehicle unattended. To buttress the above the respondent claims that the claimant was charged in court for traffic violations. While the claimant denied fault on his part, there is a statement on record written by the claimant in which he confirms the circumstances of the accident above. The claimant thereon also admits that he was indeed charged and fined for the traffic violations.....From the above I’m convinced that the accident in question was caused by the acts and or omission of the claimant.”***

6. The learned trial Magistrate therefore found that the Respondent had a valid reason for terminating the Appellant’s employment. I have had occasion to look at the Appellant’s statement alongside his letter dated 31<sup>st</sup> July 2017, with regard to the accident on 30<sup>th</sup> June 2017. The Appellant thereby accepts having parked the truck assigned to him on a hill at an undesignated place. The Appellant further admits that he was charged and convicted of a traffic offence as a result of this action.

7. The question before the trial court was whether in these circumstances, the Respondent had a valid reason for terminating the Appellant’s employment as required under Section 43 of the Employment Act.

8. The burden placed on an employer under Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment. This is what is commonly known as the ‘reasonable responses’ test which is well captured by the *Halsbury’s Laws of England, 4<sup>th</sup> Edition, Vol. 16(1B) para 642* in the following terms:

***“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably taken another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”***

9. The learned trial Magistrate considered the circumstances of the case and found that the Respondent had a valid reason for terminating the Appellant’s employment. The learned Magistrate further found that the Respondent partially complied with the procedural fairness requirements set out under Section 41 of the Employment Act.

10. On 28<sup>th</sup> July 2017, the Claimant was issued with a show cause letter to which he responded on 31<sup>st</sup> July 2017. From the evidence on record, it appears that the Claimant was not subjected to a personal hearing as required under Section 41 of the Employment Act. The Court could not therefore tell whether the Claimant’s representations were considered prior to the termination of his employment.

11. In his written submissions, the Appellant made reference to the decision in *Mary Kitsao Ngowa & 36 others v Krystalline Limited [2015] eKLR* where the Court of Appeal reiterated that for a termination of employment to pass the fairness test, both substantive justification and procedural fairness must be established.

12. In the present case, the trial court acknowledged that there was only partial compliance with the procedural fairness dictates of Section 41 of the Employment Act but went ahead to dismiss the claim for unlawful and unfair termination.

13. It seems to me that the learned trial Magistrate got it wrong on this score. Having found that Section 41 of the Employment Act had not been fully complied with, he ought not to have given the termination a clean bill of health.

14. For this reason, I will interfere with the judgment by the trial court and award two (2) months’ salary in compensation for unfair termination of employment. In arriving at this award, I have taken into account the Appellant’s short stint in the Respondent’s employment and the finding that the Respondent had a valid reason for terminating the employment. I also award the Appellant one (1) month’s salary in lieu of notice.

15. Further, the learned trial Magistrate did not address himself to the claim for unpaid salary arrears for June and July 2017. The Claimant testified that he was only paid Kshs. 10,000 for the month of June 2017. Having left employment on 3<sup>rd</sup> August 2017, the Claimant was entitled to full salary for the months of June and July 2017. It was incumbent upon the Respondent to provide proof of payment of these salary arrears and having failed to do so, this limb of the claim ought to have been allowed.

16. Regarding the claim for underpayment, all the Appellant did was to throw a figure at the face of the trial court. No formula or benchmark

was tendered before the trial court to facilitate a determination of this limb of the claim. On this account therefore, I am in agreement with the learned trial Magistrate that the claim for underpayment was not proved. The same fate befalls the claim for overtime compensation which was neither particularised nor proved.

17. Ultimately, the judgment of the lower court dismissing the Appellant's entire claim is set aside and substituted with an order allowing the claim in the following terms:

a) 2 months' salary in compensation.....	Kshs. 40,000
b) 1 month's salary in lieu of notice.....	20,000
c) Unpaid salary for June 2017.....	10,000
d) Salary for July 2017.....	<u>20,000</u>
<b>Total.....</b>	<b>90,000</b>

18. The Appellant will have the costs of this appeal and those in the court below.

**DATED SIGNED AND DELIVERED AT MACHAKOS THIS 9<sup>TH</sup> DAY OF APRIL 2020**

**LINNET NDOLO**

**JUDGE**

ORDER

In view of the declaration of measures restricting court operations due to the

COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this judgment has been delivered to the parties electronically, with their consent. The parties have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules which requires that all judgments and rulings be pronounced in open court. In permitting this course, the Court is guided by Article 159(2)(d) of the Constitution of Kenya which commands the Court to render substantive justice without undue regard to technicalities, Article 40 of the Constitution which guarantees access to justice, and Section 18 of the Civil Procedure Act which imposes a duty to employ suitable technology to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Further, in view of the ensuing disruption of the court diary, this judgment has been delivered during the court recess.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mokaya for the Appellant

Mr. Asige for the Respondent