



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT MOMBASA
CIVIL APPEAL NO. 24 OF 2019

BETWEEN
CALVIN ROSWE MAGIGE.....APPELLANT
AND
DIAMOND INDUSTRIES LIMITED.....RESPONDENT

[From the Judgment and Decree of the Hon. C.N. Ndegwa, SPM Mombasa,
in CM’s ELRC Cause No. 369 of 2018]

BETWEEN
CALVIN ROSWE MAGIGE.....CLAIMANT
VERSUS
DIAMOND INDUSTRIES LIMITED.....RESPONDENT

JUDGMENT

1. The Appellant filed Claim against the Respondent, his former Employer, seeking compensation for unfair termination, among other orders.
2. In its Judgment, the Trial Court dismissed the Claim, finding that the Appellant was invited to show cause why he should not be dismissed, and failed to respond to the letter to show cause. It was also found that he was invited to a disciplinary hearing, which he failed to attend, leaving the Respondent with no option, but to summarily dismiss him.
3. He has lodged this Appeal, listing 4 Grounds of Appeal: -
 - a. The Trial Court erred in finding that termination was procedurally and substantively fair.
 - b. The Trial Court erred in finding that the Appellant was not entitled to salary arrears, leave arrears and overtime arrears.
 - c. The Trial Court erred by totally disregarding Appellant’s Evidence and Submissions.

d. The Trial Court erred by taking into consideration matters which he ought not to have considered and disregarding factors which he ought to have considered.

4. Parties agreed in Court, on 12th March 2020, to have the Appeal considered and determined on the strength of the Record of Appeal. They subsequently filed Submissions, underscoring their respective positions.

5. The Appellant submits that Respondent's Witness, Judith Achieng' Adhiambo, corroborated before the Trial Court, that the Appellant was not paid salary up to 26th September 2018; overtime; and pending leave. He did not receive the letter to show cause, and the letter inviting him to disciplinary hearing. The address used by the Respondent in communicating to the Appellant was unknown to the Appellant. The Appellant was to respond to the letter to show cause by 2nd November 2018, yet termination was on 24th October 2018. The Respondent did not produce minutes of the disciplinary meeting. The Appellant prays the Court to set aside, or vary the Judgment of the Trial Court.

6. The Respondent submits that the address used in communicating to the Appellant, was obtained from his personnel file. It was the correct address. The Appellant refused to receive the letter to show cause, and the disciplinary hearing notice, compelling the Respondent to send the documents to the Appellant's last known address. He was given adequate opportunity to submit to the disciplinary hearing. He refused to subject himself, leaving the Respondent with no option, but to dismiss him. He did not merit compensation and notice. He was paid terminal dues as shown in the letter of termination. The Respondent urges the Court to dismiss the Appeal with costs.

The Court Finds: -

7. The Trial Court did not deal with the prayers for pending leave and salary for the month of September 2018. The Judgment does not mention these prayers, yet they were contested issues. The Respondent had submitted that if the Trial Court found, that the Appellant was entitled to leave, to grant the prayer based on a period of 4 months served.

8. The Trial Court had an obligation to deal with all the issues submitted by the Parties for adjudication. It does not appear to have done so.

9. In her evidence-in-chief, Respondent's Witness told the Court that evidence of terminal dues paid to the Appellant, was contained in the letter of termination. The letter of termination however, does not contain evidence of payment. It is a promissory note. The Appellant was told he would be paid salary up to 26th September 2018; pending leave; and overtime. This would be paid once the Appellant returned Respondent's property. When did the Appellant, return Respondent's property, and when was he paid? There was no evidence of payment - such as a cheque, banking slip, bank transfer or acknowledgement of receipt of payment - placed before the Trial Court. The letter of termination was not evidence of any payment.

10. On cross-examination, Respondent's Witness is indeed recorded to have said that she did not have evidence of payment of terminal dues.

11. The Trial Court did not deal with these prayers, which it was obligated to deal with, even upon finding that the Appellant's contract was terminated fairly, and that he did not merit notice and compensation. Section 18 [4] of the Employment Act requires that even where an Employee is summarily dismissed for lawful cause, the Employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of dismissal. The Trial Court had an obligation to determine if the Appellant was paid all his terminal dues.

12. There was considerable doubt on service of the letter to show cause, and the invitation to the disciplinary hearing upon the Appellant. The Trial Court said nothing about the competing claims on the address used in communicating with the Claimant. The letter to show cause, placed before the Trial

Court, indicates the Claimant was to respond by 2nd November 2018. Termination took place on 24th October 2018, before the notice to show cause lapsed.

13. Lastly, the Trial Court allowed the prayer for Certificate of Service. In doing so, it stated that there was no evidence that the Appellant made a demand or request to the Respondent, for the Certificate of Service, before filing the Claim. Further, that there was no evidence that the Respondent refused or neglected to issue the Certificate upon demand or request. Therefore, the Court allowed the prayer for Certificate of Service to issue, but with costs of the Claim borne by the Appellant.

14. Section 51 [1] of the Employment Act requires that an Employer shall issue to an Employee, Certificate of Service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks. There is no requirement for the Employee to make any demands or requests to the Employer, for the Certificate of Service, as suggested in the Judgment of the Trial Court.

15. In the end this Court would agree with the Appellant, that the Trial Court took into consideration matters which ought not to have been considered, and failed to take into account relevant issues which were contested by the Parties. It can alternatively, be concluded that the Trial Court did not adequately look into the Appellant's Evidence and Submissions.

IT IS ORDERED: -

a. The Appeal is allowed.

b. The Claim shall be re-tried before the Chief Magistrate's Employment and Labour Relations Court, Mombasa.

c. No order on the costs.

Dated and delivered at Mombasa this 6th day of October 2020

James Rika

Judge