



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CIVIL APPEAL NO 16 OF 2020**

**ALI ISSA OMAR.....APPELLANT**

**VS**

**CAR & GENERAL (TRADING) LTD.....RESPONDENT**

***(Appeal from part of the judgment of Hon. G. Kiage, SRM delivered on 18<sup>th</sup> May 2020 in Mombasa CMELRC No 508 of 2018)***

**JUDGMENT**

1. Before the trial court was the Appellant's claim against his former employer, Car & General (Trading) Ltd for compensation for unfair termination of employment, plus terminal dues.
2. **Hon. G. Kiage, SRM** delivered judgment on 18<sup>th</sup> May 2020, awarding the Appellant three months' salary in compensation, one month's salary in lieu of notice and salary arrears. The Respondent was also directed to issue the Appellant with a Certificate of Service.
3. Being dissatisfied with part of the judgment, the Appellant filed the present appeal. In his Memorandum of Appeal dated 18<sup>th</sup> June 2020, the Appellant raises the following grounds of appeal:
  - a) That the learned Magistrate erred in fact and in law by arriving at the conclusion that Kshs. 36,891 was net salary thus arriving at wrong awards;
  - b) That the learned Magistrate erred in fact and in law by awarding the Appellant 3 months' salary for unfair termination, an award which was inordinately low;
  - c) That the learned Magistrate erred in fact and in law by using a salary of Kshs. 36,891 instead of a salary of Kshs. 40,000 thereby arriving at wrong awards in the one-month salary in lieu of notice and unpaid salary for the months of August, September and October;
  - d) That the learned Magistrate erred in fact and in law by denying the Appellant an award for house allowance and unpaid leave days;
  - e) That the learned Magistrate erred in fact and in law by denying the Appellant punitive and exemplary damages;
  - f) That the learned Magistrate erred in fact and in law by totally disregarding the Appellant's pleadings and submissions, thereby arriving at a wrong conclusion;
  - g) That the learned Magistrate erred in fact and in law by disregarding the evidence in the Appellant's pleadings thereby arriving at a wrong conclusion;
  - h) That the learned Magistrate erred in fact and in law by disregarding what he ought to have considered and considering what he ought to have disregarded, thus arriving at a wrong conclusion.
4. This is a first appeal and I am therefore required to reconsider and re-evaluate the evidence on record and giving allowance for lack of an opportunity to meet the witnesses first hand, arrive at my own conclusions.
5. The applicable principles were well restated in ***Ndungu Dennis v Ann Wangari Ndirangu & another [2018] eKLR*** as follows:

***“i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;***

***ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her;***

***iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time.”***

6. The Appellant stakes eight grounds of appeal which I will condense into the following four (4) categories:

- a) The Appellant’s monthly salary;
- b) The claim for house allowance;
- c) The claim for leave pay;
- d) Quantum of damages.

### **The Appellant’s Monthly Salary**

7. The Appellant faults the trial court for adopting the figure of Kshs. 36,891 as the Appellant’s monthly salary and states that his salary was in fact Kshs. 40,000.

8. Looking at the parties’ pleadings and submissions, it appears that the disagreement on this issue arises from a misunderstanding of the salary factor to be used in tabulating claims arising from termination of employment.

9. From the Appellant’s letter of appointment dated 10<sup>th</sup> April 2017, his gross monthly salary was Kshs. 40,000 and because there was no itemised pay statement filed in court, the trial Magistrate had no basis for adopting the net figure of Kshs. 36,891.

10. The learned Magistrate therefore ought to have used the known figure of Kshs. 40,000 to tabulate the claim upon which the employer would subject the global award to statutory deductions as required under Section 49(2) of the Employment Act.

11. The requirement for employers to subject awards under Section 49 of the Employment Act to statutory deductions is well settled (see ***Kioko Joseph (suing as the legal representative of the Estate of Joseph Kilinda v Bamburi Cement Ltd [2017] eKLR***). I will therefore not say anything more on this issue.

### **House Allowance**

12. The Appellant faults the trial court for rejecting his claim for house allowance. Section 31(1) and (2) of the Employment Act provides as follows:

***(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service-***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).***

13. From the evidence on record, the Appellant was paid a gross monthly salary, which would ordinarily be inclusive of house allowance and since there was no claim for underpayment, the trial court was right in declining the claim for house allowance.

### **Leave Pay**

14. The trial court rejected the Appellant’s claim for leave pay on the ground that the Appellant did not supply supportive evidence. On this limb of the claim, the learned trial Magistrate got it wrong on two fronts; first, arising from the command to keep leave records issued under Sections 10 and 74 of the Employment Act, the burden to prove entitlement and utilisation of leave days lies with the employer, not the employee.

15. Second, in the termination letter issued to the Appellant on 25<sup>th</sup> October 2018, the Respondent admitted owing the Appellant leave pay for 34 days up to October 2018. At the very least the trial court ought to have allowed the claim for leave pay in terms of this clear

admission.

### Quantum of Damages

16. The Appellant complains that the compensatory award of three months' salary granted by the trial court was ordinally low.

17. In its decision in **Kenfreight (E.A) Limited v Benson K Nguti [2019] eKLR** the Supreme Court of Kenya affirmed that in making an award under Section 49 of the Employment Act, the court exercises judicial discretion on what is fair and just in the circumstances of the case.

18. The Apex Court clarified:

***“On an award of damages, the Act limits the award a court can make to a maximum of 12 months’ salary. In as much as the trial Court therefore does have discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-section 4 of the Employment Act.”***

19. In his judgment, the learned trial Magistrate stated:

***“Considering the claimant’s conduct that led to his termination I award three (3) months net salary (Kshs. 36,891/-) in compensation for unfair termination.”***

20. In determining an appeal questioning the exercise of judicial discretion by a trial court, the rule of thumb is that the appellate court will not interfere unless it is shown that the trial court failed to direct itself properly in law and fact, taking all relevant considerations into account. This was the holding in in **Printing Industries Limited & another v Bank of Baroda [2017] eKLR** and I have no reason to depart.

21. Section 49(4) of the Employment Act lists a number of factors to be considered by a court in making an award in favour of an employee. The factors are many; ranging from the wishes of the employee, his contribution to the termination, length of service to alternative employment opportunities.

22. A reading of this provision reveals that a court is not required to consider all the factors. The operative phrase is ‘any or all.’

23. The learned trial Magistrate found that the Respondent had proved a reason for terminating the Appellant’s employment, being transacting company stocks worth Kshs. 1.14m through his personal mobile handset.

24. The Magistrate however faulted the Respondent for violating due procedure and therefore awarded the Appellant three months’ salary in compensation. In making this award, the learned trial Magistrate considered the Appellant’s conduct and I find no basis to fault his exercise of judicial discretion in this regard.

25. As regards the claim for punitive and exemplary damages, I am guided by the Court of Appeal decision in **Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR** where the difference between ordinary and exemplary damages was given in the following terms:

***“The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter.”***

26. Having re-evaluated the evidence for myself, I did not find any action on the part of the Respondent to warrant punitive damages. I therefore agree with the finding by the learned trial Magistrate on this score.

27. In the end, this appeal partially succeeds and the award by the trial court is varied as follows:

a) 3 months’ salary in compensation.....	Kshs. 120,000
b) 1 month’s salary in lieu of notice.....	40,000
c) Salary for August, September & October.....	120,000
d) Leave pay for 34 days (40,000/30*34).....	<u>45,333</u>
<b>Total.....</b>	<b>325,333</b>

28. The Respondent will bear the costs of this appeal and those in the court below.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 17<sup>TH</sup> DAY DECEMBER 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in 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.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Mwawasaa for the Appellant

Miss Mkala for the Respondent