



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CIVIL APPEAL NO 17 OF 2020

PROFESSIONAL CLEAN CARE LIMITED.....APPELLANT

VS

DANSON MWENDWA MUTHOKA.....RESPONDENT

(Appeal from the Judgment of Hon Lesootia A. Saitabu, PM dated and delivered on 18th June 2020 in

Mombasa Chief Magistrate's Court Employment Cause No 376 of 2019)

JUDGMENT

Introduction

1. On 25th April 2019, the Respondent (Claimant in the trial court) filed a Statement of Claim seeking compensation for unlawful termination of employment.
2. The Appellant (Respondent in the trial court) filed a Memorandum of Response on 26th September 2019.
3. The claim was heard by **Hon Lesootia A. Saitabu, PM**, who in a judgment delivered on 18th June 2020, made the following award in favour of the Respondent:
 - a) A declaration that the termination of his employment was unfair;
 - b) Terminal dues in the total sum of Kshs. 344,050;
 - c) Certificate of service;
 - d) Costs plus interest
4. The Appellant was dissatisfied with the judgment by the trial Magistrate and therefore filed the present appeal before this Court.

The Appeal

5. In its Memorandum of Appeal dated 26th June 2020, the Appellant raises the following grounds of appeal:

- a) The learned Magistrate erred in law and in fact in finding that the Respondent had been unfairly terminated;
 - b) The learned Magistrate erred in law and in fact in finding that the Respondent was entitled to any of the reliefs he had sought;
 - c) The learned Magistrate erred in law and in fact in failing to find that the Respondent had not proved his case on a balance of probabilities;
 - d) The learned Magistrate erred in law and in fact in awarding the Respondent house allowance despite evidence on record showing that he was paid a gross salary;
 - e) The learned Magistrate erred in law and in fact in awarding the Respondent house allowance for the entire period of his employment despite evidence to the contrary;
 - f) The learned Magistrate erred in law and in fact in awarding the Respondent leave pay for 2013 and 2014 despite the same being unsupported by any evidence;
 - g) The learned Magistrate erred in law and in fact in awarding the Respondent reliefs that were time barred in violation of Section 90 of the Employment Act;
 - h) The learned Magistrate erred in law and in fact in failing to interpret the law touching on employment and labour relations properly hence arriving at a wrong decision;
 - i) The learned Magistrate erred in law and in fact in failing to recognize that he was exercising a special jurisdiction governed by the Employment and Labour Relations Court Act and subsidiary legislations and not the ordinary civil jurisdiction conferred upon the Magistrates' Courts;
 - j) The learned Magistrate erred in law and in fact in failing to analyse the evidence on record thus leading to an erroneous finding and decision;
 - k) The learned Magistrate erred in law and in fact in the construction of evidence before the Court and the reliance of extraneous matters which led to an erroneous finding and decision;
 - l) The learned Magistrate erred in fact and in law in failing to consider the issues raised in the pleadings, proceedings, submissions and case law filed in court;
 - m) The learned Magistrate erred in fact and in law in stating that the Appellant's submissions were not on record and therefore ignoring the same despite the Appellant filing and serving the submissions in good time and forwarding the same to the Hon Magistrate via email, receipt of which was acknowledged;
 - n) The learned Magistrate erred in fact and in law in making an award which is unreasonably high and not supported by law.
6. In its Memorandum of Appeal, the Appellant raises fourteen (14) grounds of appeal which I have condensed into the following:
- a) The Appellant's submissions before the trial court;
 - b) Compensation for unlawful and unfair termination;
 - c) House allowance;
 - d) Notice pay;

- e) Leave pay;
- f) Level of award;
- g) Limitation.

The Appellant's Submissions

7. In its written submissions filed in this Court on 13th April 2021, the Appellant takes issue with a statement in the judgment by the trial court that the Appellant's submissions were not on record. In this regard, the Appellant takes the view that failure by the trial court to consider its submissions resulted in a mistrial. On this account, the Appellant asks this Court to set aside the entire proceedings at the lower court and remit the matter for retrial.

8. This being a first appeal, the Court has latitudes within the province of a retrial. Within these parameters, I am required to reconsider and re-evaluate the evidence on record and arrive at my own conclusions. In this respect, I take guidance from the decision in *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR* where the Court of Appeal stated the following:

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”

9. In light of the foregoing, I am persuaded that I am well empowered to consider the Appellant's submissions filed at the lower court and fill any gaps that the learned trial Magistrate may have left. I do not think therefore that failure by the trial court to consider the Appellant's submissions, for whatever reason, would render the entire proceedings a nullity. That is all I will say on this issue.

The Termination

10. In reaching his verdict that the termination of the Claimant's employment was unlawful and unfair, the learned trial Magistrate stated thus:

“The respondent's witness testified that the claimant's area of supervision was not well cleaned and that from the year 2016 he failed to perform his duties causing them to issue the claimant with several warning letters. My understanding of the above is that the respondent was of the view that the claimant underperformed or otherwise that he failed or wilfully neglected to do that which is his duty. Section 44 (4) (c) of the Employment Act provides that neglect to perform duty constitutes a justifiable cause for summary dismissal.

The section above provides that nothing precludes an employer or employee from alleging or disputing whether the facts that gave rise to alleged misconduct constitute a justifiable cause for summary dismissal. In essence an employee must be given an opportunity to dispute facts to constitute misconduct.

From the evidence on record the claimant was not given reasons for his termination neither was he given an opportunity to dispute the allegations of misconduct.”

11. The learned Magistrate therefore concluded:

“The respondent did not give a valid reason that led to the termination of the claimant, it failed to establish that there was any fair or valid reason for termination neither did it demonstrate that termination was in accordance with fair procedure. The respondent's conduct therefore offended the provisions of Section 41 and 45 of the Employment Act and I find as such.”

12. The Respondent's employment was terminated by letter dated 20th July 2018 stating the following:

"Dear Danson,

RE: TERMINATION

This is to inform you that you are summarily dismissed from employment in Professional Cleancare Ltd. with effect from 20th July 2018 because your services are no longer required.

Take note that you will be paid salary for days worked in the month of July 2018, one month's salary in lieu of notice and leave days earned and not taken to date, if any. You are required to return all company property that are in your possession to the Supervisor on ground and obtain a clearance letter.

We wish you success in your future endeavors.

Yours faithfully,

PROFESSIONAL CLEAN CARE LTD

(signed)

GRACE R. NJOROGE

HUMAN RESOURCE MANAGER"

13. This letter simply states that the Claimant's services were no longer required. In its pleadings and testimony before the trial court however, the Appellant advanced poor performance by the Respondent, as the reason for termination.

14. In its decision in *Maghanga Newton Raphael v Panal Freighters Limited [2021] eKLR* this Court reiterated the required procedure for terminating employment on account of poor performance in the following terms:

"The procedure for terminating employment on the ground of poor performance is now clear and it is this; that the employee is first made aware of their shortcomings and allowed a reasonable time to improve. Further, any performance appraisal upon which the decision to terminate is made must have the input of the employee (see Jane Wairimu Machira v Mugo Waweru and Associates [2012] eKLR and Joshua Kabaka v Tandu Alarms Systems Limited [2019 eKLR)."

15. In his testimony before the trial court, the Appellant's General Manager, Fred Oballa admitted that the Respondent was not subjected to any disciplinary process, prior to termination. With this unequivocal admission by the Appellant, the trial court had no choice but to find the termination of the Respondent's employment unlawful and unfair. The finding by the learned trial Magistrate on this limb is therefore confirmed.

House Allowance

16. While faulting the award by the trial court on house allowance, the Appellant submits that the Respondent earned a consolidated salary which was inclusive of house allowance.

17. Section 31(1) and (2) of the Employment Act provides that:

(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).

18. According to the Respondent's pay slips filed before the trial court, the figure given for basic salary and gross salary was the same, being Kshs. 13,000. There was no provision for house allowance and there was no evidence placed before the court that the Respondent earned a consolidated salary. The salary review letter dated 2nd August 2012, which raised the Respondent's salary to Kshs. 13,000 did not alter this fact.

19. With this in view, the finding by the trial court that the Respondent was not paid a house allowance and the award thereon cannot be faulted and are confirmed.

Notice Pay

20. A reading of the termination letter issued to the Respondent of 20th July 2018 indicates that he was to be paid notice pay. In his judgment dated 18th June 2020, the learned trial Magistrate stated the following:

"As held above the claimant was dismissed without notice, while the respondent contends the same was paid there is no evidence of such payment or remittance of same from the respondent to the claimant. I thus award the claimant Kshs. 13,000.00 notice pay."

21. If the Appellant had indeed paid notice pay as claimed, it ought to have adduced documentary evidence to that effect. Having failed to do so, it cannot fault the trial court in that regard.

Leave Pay

22. With regard to leave pay, the Appellant contends that the Respondent did not adduce evidence to support his claim. However, being the custodian of employment records, it was incumbent upon the Appellant to produce such records to counter the Respondent's claim (see Sections 10 and 74 of the Employment Act.)

23. In the absence of any such records, the learned Magistrate could only find in favour of the Respondent and the award on leave pay is consequently confirmed.

Level of Award

24. The Appellant asks this Court to interfere with the award made by the trial court on the ground that it is unreasonably high. In his written submissions filed on 5th May 2021, the Respondent reminds the Court that an award of compensation is discretionary.

25. The rule of thumb is that an appellate court will not interfere with a discretionary award by a trial court unless there is clear evidence of misdirection. In *Nathan Chesang Moson v Grand Creek Llc & another [2020] eKLR* the Court of Appeal restated this rule as follows:

"The circumstances in which this Court can interfere with such exercise of discretion are circumscribed. This Court may only interfere with the exercise of such discretion when, in the words of the predecessor of this Court in Mbogo and Another v Shah

[1968] EA 93, it is satisfied that the decision of the lower court is clearly wrong:

“...because it has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

26. In arriving at the level of compensation, the learned trial Magistrate took into account the Respondent’s length of service and the manner in which he was dismissed. This is what he was required to do under Section 49 of the Employment Act and I find nothing to cause me to interfere with his award.

Limitation

27. In its Memorandum of Appeal and written submissions, the Appellant made general statements on limitation of time but did not explain which parts of the award were time barred. The Court therefore had no basis upon which to make a finding on this ground.

Final Orders

28. On the whole, this appeal fails and is dismissed with costs to the Respondent in this Court and in the court below.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 29TH DAY JULY 2021

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. Weru for the Appellant

Mrs. Nyange for the Respondent



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