



REPUBLIC OF KENYA



KENYA LAW
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**H. Young & Company (EA) Limited v Ng'eno (Appeal 7 of 2020)
[2022] KEELRC 14654 (KLR) (6 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 14654 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 7 OF 2020
M MBARŪ, J
OCTOBER 6, 2022**

BETWEEN

H. YOUNG & COMPANY (EA) LIMITED APPELLANT

AND

HILLARY KIPKURUI NG'ENO RESPONDENT

(being an appeal from the judgement and decree of Hon. D. W. Mburu at the Magistrates Court at Milimani dated 24th January, 2020 in CMELR Cause No.605 of 2016)

JUDGMENT

- 1 The facts leading to this appeal are that the respondent herein was an employee of the appellant as a tipper driver from July, 2013 and on October 2, 2018 his employment was unfairly terminated without notice or a hearing. At the time he was earning a wage of Ksh 55,434. He hence claimed for notice pay, damages, payment of gratuity and issuance of a certificate of service.
- 2 Before the trial court, the appellant filed a response and denied the allegations by the respondent and asserted that there was employment but over different periods of time from August 5, 2013 to May 25, 2017 then September 4, 2017 to May 9, 2018 then August 24, 2018 to October 2, 2018 when he left employment due to carelessness and negligence which led to loss and damage as the on October 1, 2018 the respondent was involved in an accident in the Aberdare National Park while driving KAX 403C a tipper vehicle of the appellant. following investigations by the security team it was noted that the claimant had been negligent in failing to take the tipper vehicle for maintain ace for preventive careless driving resulting in brake failure which led to a decision to terminate his employment through summary dismissal.
- 3 The response was also that the claimant had been employed for less than 3 months and under section 45(3) of the *Employment Act*, 2007 he was barred from filing suit.



- 4 That the claimant had voluntarily acknowledged full payment in final settlement of his dues and the suit was an abuse of court process.
- 5 The trial court heard the parties and delivered judgement on January 4, 2020 in favour of the respondent on the finding that there was no fair hearing of the respondent before summary dismissal leading to unlawful termination of employment and proceeded to award the employee notice pay, service pay, compensation, certificate of service and costs.
- 6 Aggrieved, the appellant filed 5 main grounds of appeal challenging the judgment and decree of the trial court which can be summarised that the trial court erred in law and fact and in law in dismissing the appellants defence on account that the final discharge certificate was signed by the respondent as the employee and also failed to take into account the provisions of section 45(3) of the Employment Act, 2007 that the suit was unsustainable. That the appellant had a valid, fair and just reason leading to termination of employment followed by due process and hence lawful.
- 7 Other grounds of appeal are that the trial court erred in law and in fact in holding that the respondent employee had been employed for 5 years contrary to the given record and hence the remedies awarded are erroneous and the appeal should be allowed and the judgement of the trial court set aside in its entirety.
- 8 Both parties attended court on February 24, 2022 and agreed to address the appeal by way of written submissions. Only the appellant complied and filed written submissions on May 6, 2022.
- 9 The appellant submitted that a discharge certificate signed voluntarily is a bar to a suit as addressed in the case of Thomas De La Rue (K) Limited v David Opondo Omutelema [2013] eKLR that when the issue of a discharge certificate is raised, the court must make a determination as to whether it was issued voluntarily and whether the employee was seized of all relevant facts.
- 10 The appellant submitted that under section 45(3) of the Employment Act, 2007 an employee who has worked for less than 13 months can be dismissed from employment without notice and such is not an unfair termination of employment. the respondent had worked for different phases for the appellant the last being from August to October, 2018 a period of two (2) months only and the statutory concept of unfair termination of employment does not apply to him.
- 11 The awards made for compensation, notice pay and service pay are not justified and the appeal should be allowed.

Determination

- 12 I have considered the submissions of the appellant and the record of appeal and this being a first appeal and guided by the principles addressed by Court of Appeal in the case of *Selle versus Associated Motor Boat Co.* [1968] EA 123 this court is under a duty to delve at some length into factual details of the matter as addressed and revisit the facts as presented in the trial court, analyse the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.
- 13 The place of a discharge certificate issued to the employee at the end of employment is to ensure that the employee accepts the terminal dues paid by the employer and taking into account the detailed submissions by the appellant in this regards, such a discharge voucher/certificate in my view is regulated in law under section 35(4) of the Employment Act, 2007 that;
4. Nothing in this section affects the right—



- a. of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
 - b. of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.
- 14 Where an employee enjoys a right in law, such cannot be negated through a discharge voucher/certificate. The right to challenge and lawfulness or fairness of termination of employment or where employment has terminated without due process is a right secured in law.
- 15 The appellant has also challenged the application of section 45(3) of the *Employment Act*, 2007 in this regard and that the trial court failed to take into account that the employee had only been employed for 2 months prior to termination of employment and hence cannot rely on a claim that there was unfair termination of employment.
- 16 Section 45(3) of the *Employment Act*, 2007 requires that;
 - (3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- 17 These provisions limit an employee’s right to a claim of unfair termination of employment on the grounds that it was unfair.
- 18 The Court of Appeal in the case of *Samuel G Momanyi v SDV Transami Kenya Ltd* [2017] eKLR re-affirmed the High Court findings that section 45(3) of the *Employment Act*, 2007 provisions are unconstitutional as they preclude employees who had worked for less than 13 months from rising claims against unfair termination and that such was discriminatory and unjustifiable. The High Court in addressing these provisions in *Samuel G Momanyi v the Attorney General & Another* [2012] eKLR had held that;
- 19 Reading the two sections together with articles 27 and 48 of the *Constitution*, there is obvious discrimination and the applicant and those in his situation have been denied equal protection and equal benefit of the law and they have also been denied “the full and equal employment of all rights and fundamental freedoms” to the extent expected by the *Constitution*. They have also been denied “access to justice.”...Why discriminate in such a blatant manner and why close the doors of justice to an otherwise deserving litigant on account of period served which is not legitimately too short to have any lawful meaning?
- 20 The provisions of section 45(3) of the *Employment Act*, 2007 have since been declared unconstitutional by a superior court of record.
- 21 In the case of *Law Society of Kenya v Kenya Revenue Authority & another* [2017] eKLR the court held that when a law is found to be inconsistent with the *Constitution*, it ceases to have any legal consequences and that a court is not empowered to resuscitate legislation that has been declared invalid. In this regard, I agree with the findings cited above that the provisions of section 45(3) of the *Employment Act*, 2007 are unconstitutional and do not find any justification since they discriminate against a class of employees from accessing justice for the simple reasons of working for less than 13 months.
- 22 In this regard, the trial court erred in failing to address this issue as pleaded and presented before it.
Tied to this issue is the appellant’s case that the respondent was under different phases of employment the last phase being from August to October, 2018 and hence had only worked for two months prior



- to termination of his employment. the trial court made a finding that the respondent had worked for 5 years and proceeded to assess the remedies in this regard.
- 23 The appellant submitted evidence to the effect that the respondent was employed and issued with written letters of employment. employment covered the period from; August 5, 2013 to May 25, 2017; September 4, 2017 to May 9, 2018; and August 24, 2018 to October 2, 2018.
- 24 Pursuant to section 90 of the Employment Act, 2007 each employment letter covered a distinct and separate term of employment the first covering 45 months; the second covering 8 months and the last covering 2 months. These phases do not apply cumulatively. Each come with own rights and any claims therefrom has context going back 3 years limitation.
- 25 The error in assessing the remedies due based on the entire employment period is apparent on the record and to this extent the appeal is found with merit.
- 26 On the record, the facts presented are that on October 1, 2018 the respondent was involved in an accident in the Aberdare National Park while driving KAX 403C a tipper vehicle of the appellant. There were investigations which found the respondent careless and negligent leading to termination of employment.
- 27 In employment and labour relations, the right to a hearing before employment is terminated is sacrosanct. Whether the employee is of misconduct or gross misconduct, the motions of section 41 and 44 of the Employment Act, 2007 are mandatory that the employee must be issued with notice and allowed to make representations before employment is terminated however gross the misconduct is. Where the employer is unable to hear the employee on his representations, the reasons thereto must be given. Section 41(2) of the Act requires that;
- (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.
- The trial court arrived at a proper finding that there was no notice issued to the respondent and he was not allowed a hearing and the claim for notice pay was justified. To this extent the appeal is without merit.
- 28 However, on the award for compensation, the respondent had pleaded for damages for unlawful termination. The trial court made an award for compensation for unlawful termination of employment. whereas the remedy of damages is allowed under section 12 of the Employment and Labour Relations Court Act, 2011 on a claim premised under the provisions of the Employment Act, 2007 where there is alleged unfair termination of employment, upon such a finding that there was unfair termination of employment, under section 49 of the Act, compensation is to be assessed and allocated accordingly. Unless there are pleadings that there were constitutional violations, to interchange an award of damages with that of compensation without assigning any reasons is in error.
- 29 In this regard, the respondent had pleaded for damages and is bound by such pleadings and the trial court erred in awarding compensation without giving reasons thereof.
- 30 The trial court awarded the respondent service pay for the entire period of serve alleged to be 5 years. on the finding above, each phase of service was different and distinct and the apply a cumulative working period is not justified.
- 31 Further, the respondent had pleaded for payment of gratuity and not service pay. service pay is due to an employee pursuant to the provisions of section 35 (5) and (6) where the employer fails to deduct and



remit statutory dues and has not registered the employee with an alternative pension scheme. Evidence in this regard is required.

- 32 On the record, the respondent filed various payment statements and picking a few, In December, 2017 there is NSSF payment;
In April, 2018 there is NSSF payment; and
In September, 2017 there is a payment to NSSF.
- 33 These payment put into account, service pay was not an entitlement at the end of employment whatever the reasons for the same.
- 34 Payment of gratuity is not a legal requirement unless this is a term of contract, through an agreement or by private treaty.
- 35 However in the payment statement of June, 2017 the appellant paid the respondent a gratuity payment of ksh 61,808. The court takes it that this was either through the practice in place and or the fact that the respondent was unionised and there was a collective agreement (CBA) since all his payment statements have a union deduction to KBCTFAIE and to COTU. On this basis, a further award in judgement of a service pay is not justified and to this extent the appeal is with merit.
- 36 On the findings above, the appeal is found with merit and is hereby allowed and the Judgement of the trial court dated January 24, 2020 in Milimani CMELR Cause No 605 of 2016 is hereby set aside save the award of notice pay at Ksh 55,434 is found justified.
- 37 In view of this outcome, each party shall bear own costs of this appeal.

DELIVERED IN COURT AT NAIROBI THIS 6TH DAY OF OCTOBER, 2022.

M. MBARŪ JUDGE

In the presence of:

Court Assistant: Okodoi

.....and.....

