



REPUBLIC OF KENYA



2NK Sacco Society Limited v Irungu & 2 others (Employment and Labour Relations Appeal E019 of 2023) [2024] KEELRC 2423 (KLR) (4 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2423 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E019 OF 2023
ON MAKAU, J
OCTOBER 4, 2024**

BETWEEN

2NK SACCO SOCIETY LIMITED APPELLANT

AND

ROBERT GEORGE IRUNGU 1ST RESPONDENT

HARUN WACHIURI THUMBI 2ND RESPONDENT

CHARLES MWANIKI 3RD RESPONDENT

(Being an appeal against the Judgment and Decree of Hon. M.Okuche, Senior Principal Magistrate delivered on 31st October, 2023 in Nyeri MCELRC No.E40, 41 and 42 of 2022)

JUDGMENT

Introduction

1. By a Memorandum of Appeal dated 15th November 2023, the appellant sought to reverse the whole judgment of the lower court on the following grounds: -
 - a. The learned Trial Magistrate erred in fact and in law by failing to analyse the testimonies of the parties before him thereby misdirecting himself on the issues for determination.
 - b. That the learned Trial Magistrate erred in law in failing to distinguish a contract for service from a contract of service.
 - c. That the learned Trial Magistrate erred in fact and in law in failing to determine the pertinent testimonies of the parties thereby reaching the wrong conclusion on the matter before him.



Factual background

2. The appeal arises from three separate suits filed by the respondents against the appellant being Nyeri CMELRC Case No. E040, E041 and E042 of 2022. Case No.E040 of 2022 was taken as the test suit which resulted to the impugned judgment and the awards in the other two suits.
3. In brief, the facts of the case are that the respondents sued the appellant in the lower court alleging that they were formerly employed by the appellant as Customer Care Personnel before it unfairly terminated their employment on diverse dates in 2022. They alleged that the termination was for baseless allegation of misconduct at the work place and they were not accorded any hearing before the termination.
4. The appellant denied that it had employed the respondents and also denied the alleged unfair termination. It averred that the respondents were employed by the owners of the vehicles they were operating, who were members of the Sacco. It therefore prayed for the suit to be dismissed with costs.
5. During the trial, the 1st respondent (claimant in the test suit) testified that he was employed by the appellant on 18th August 2002 as a Customer Care Personnel for a monthly salary of Kshs.24,000. His services were terminated by the appellant in January 2022 for non-existent misconduct at work place. He was never given any prior notice or any hearing.
6. On cross-examination he admitted that he was not given a written contract or appointment letter but he was issued with staff identity card and uniform by the appellant's management. He contended that he saw advertisement of the position by the appellant and he went to its office in Nyeri and he was employed. He started with a daily pay of Kshs.600 but his salary was not fixed due to loan deductions. His supervisor was Gachuchia but he was dismissed from work by the Operations Manager.
7. Mr. Douglas Gachuchia, appellant's CEO testified as DW1 and adopted the statement written by his predecessor, Ann Nyawira as his evidence in chief. He then stated that the appellant's members own matatus (vehicles) and the role of the Sacco was basically coordination of the members' employees, stage touts, stage supervisors and drivers. The said employees are for the members but the Sacco has its own staff in the office with appointment letters.
8. He denied that the respondent was an employee of the appellant and the Sacco staff badge and uniform did not mean that he was employed by the appellant. The items are given to employees of the Sacco members but the card certifies that the respondents were employees of the appellant.
9. On cross examination, DW1 admitted that he did not have authority to plead on behalf of the appellant nor was there any minute authorising him to testify on behalf of the appellant. He denied being aware how much employees of its members earn.
10. After the hearing both sides filed written submissions and the court made the impugned judgment whereby it concluded that the respondents were employees of the appellant; that their employment was unlawfully terminated; and that they were entitled to the reliefs sought.

Submissions in this appeal

11. It was submitted for the appellant that the circumstances of the case did not disclose existence of a contract of service between the respondents and the appellant. It was argued that the respondents admitted that they were not paid any salary but commission. As such it was submitted that the trial court misdirected itself on the evidence in the matter and arrived at the wrong conclusion. The said



- error, then led to an award which was not justifiable. Reliance was placed on the case of *Samuel Wambugu Ndirangu v 2NK Sacco Society Limited* (2019) eKLR.
12. It was submitted that the appellant demonstrated by evidence that it did not employ the respondent but rather coordinate the management of its members' employees. The said role was merely facilitative and it included issuance of uniform and name tags emblazoned with its logo. The said items were provided in order to maintain order in the chaotic sector, facilitate operations, preserve brand and stave off competition. Consequently, the court was urged to allow the appeal with costs.
 13. On the other hand, it was submitted for the respondent that there was no error in the decision of the trial court and as such the appeal should be dismissed with costs. It was submitted that DW1 (appellant's CEO) admitted in evidence that the appellant bought and issued the respondents with identification tags which indicated that the respondents were employees of the Sacco and the same should be surrendered to the appellant when employment is terminated.
 14. It was submitted that even without a written contract, there was sufficient evidence of employment relationship between the appellant and the respondents. Reliance was placed in *Charles Muthusi Mutua v Kathi o Kakoka Services Limited* (2022) eKLR.
 15. It was submitted that the allegation that the appellant was managing employees of its members is to shift blame to non-existent entity. It was submitted that there is evidence of payment of daily wages of Kshs.600 which was later deposited as monthly salary. Consequently, it was submitted that the respondents were employees and the appellant was legally barred from unfairly terminating their employment.
 16. For emphasis, reliance was placed on the case of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR where the court held that for termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification refers to the reason for the termination while procedural fairness requires that the employee be accorded an opportunity to be heard.
 17. It was submitted that the appellant did not discharge the burden of proof of fairness in terminating the respondent's employment. It also did not adduce any evidence to establish the existence of the alleged members who own the vehicles. Besides, DW1 did not prove that he had authority to plead on behalf of the appellant as required by law. Reliance was placed on *R v Registrar General & 13 Others* (2005) eKLR.

Analysis and determination

18. This being a first appeal, the court has the mandate of re-evaluating the evidence on record and make its own conclusions, bearing in mind that it did not see the witnesses when giving their testimonies. I gather support from the case of *Selle v Associated Motor Boat Company Ltd* (1968) EA 123 where the court held thus: -

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular



circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19. Having considered the evidence on record, and the rival submissions, the following issues fall for determination: -
- a. Whether the respondents were employees of the appellant.
 - b. Whether the employment was unfairly terminated.
 - c. Whether the respondents are entitled to the reliefs awarded by the trial court.

Employment relationship

20. The appellant denies that the respondents were its employees and avers that they were employed by its members. It alleged that the members were the owners of the vehicles and the employers of the respondents while its role was facilitative and coordination.
21. However, the respondents have produced name tags to prove that they were employees of the appellant.
22. Section 2 of the *Employment Act*, 2007 defines employee, employer and contract of service as follows: -

“employee” means a person employed for wages or a salary and includes an apprentice and indentured learner;

“employer” means any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company;

“Contract of service,” is an agreement whether oral or in writing and whether expressed or implied to employ or to serve as an employee for a period of time and includes a contract of apprenticeship”

23. In this case, there is evidence that the respondents were employed for daily wage, they were issued with uniforms and name tags by the appellant and they were being supervised by the appellant. The Name Tags has the following information: -

“This identification must be carried at all times and if lost, report immediately. It must be surrendered to 2NK SACCO when employment is terminated. This is to testify that the person whose name and photograph appears above is our employee.”

24. The above caption in the Name Tag speaks for itself. It clearly announces that the respondents were employees of the appellant. I need not say more on the same but agree with the trial court that the respondents were employees of the appellant as alleged in their respective pleadings and witness statements. In doing so, I wish to say that the facts of this case are distinguishable from Samuel Wambugu Ndirangu case, *supra*.

Unfair termination

25. Section 45 (1) & (2) of the *Employment Act*, 2007 provides that: -

“(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove –



- a. That the reason for the termination is valid;
- b. That the reason for the termination is a fair reason -
 - i. Related to the employee's conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
- c. That the employment was terminated in accordance with fair procedure.”

26. In the instant case, the appellant neither proved a valid reason for terminating the respondents' employment nor did it prove that it gave them a hearing before the termination. It merely denied employment relationship and the termination of the same. It follows that the evidence by the respondents about the unfair termination has not been rebutted and therefore the appellant terminated the respondents' employment unfairly within the meaning of section 45 of the *Employment Act, 2007*.

Reliefs

27. In view of the foregoing conclusion, I am satisfied that the respondents are entitled to damages under section 49(1) of the said Act, being salary in lieu of notice and compensation for the unfair termination. They were not given written contract indicating the notice period before termination. Section 35(1)(c) of the *Employment Act* provides that a notice of 28 days is to be given for employees receiving payment on monthly basis.
28. As regards the prayer for compensation, I am aware that the same is a discretionary relief which ordinarily should not be disturbed. Such disturbance occurs when the trial court acted on wrong principles of law or without supporting evidence and thereby made an award which is manifestly excess or too low.
29. Section 49(4) of the *Employment Act, 2007* provides the factors to be considered when deciding which relief to grant to an unfairly dismissed employee. One of the factors to consider include the employee's length of service to the employer and whether the employee has caused the termination through misconduct. The trial court awarded the maximum 12 months' salary upon consideration that the respondents served the appellant for over 19 years before the unlawful termination.
30. It follows that the trial court justified the discretionary award as required by law. The award was not unreasonable. Consequently, I find that the discretionary impugned award does not qualify for interference on appeal.
31. I also find that the appellant has not laid any basis upon which to set aside or vary the other damages awarded to the respondents by the trial court. Consequently, I find that the appeal lacks merits and it is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 4TH DAY OF OCTOBER, 2024.

ONESMUS N MAKAU

JUDGE

Order



This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the [ELRC Procedure Rules](#) which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

