Riley Falcon Security Services Limited v Bosire (Appeal E015 of 2023) [2024] KEELRC 259 (KLR) (15 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 259 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E015 OF 2023

CN BAARI, J

FEBRUARY 15, 2024

BETWEEN

RILEY FALCON SECURITY SERVICES LIMITED ..... APPELLANT

AND

KEVIN OKENGO BOSIRE ..... RESPONDENT

(Being an appeal from the Judgment and Decree of Hon. E. A. Obina (SPM) delivered on 16th February, 2023 in Kisumu CMELRC Cause No. 163 OF 2020)

JUDGMENT

1. This judgment relates to an appeal arising from a decison rendered on 16th February, 2023, where the Trial Court entered judgment in favour of the Respondent for payment of one-month salary in lieu of termination notice, compensation for unfair termination and payment for leave not taken.

2. The Appellant being aggrieved by the decision of the Trial Court, lodged this appeal on 27th February, 2023.

3. The appeal is premised on the grounds that:

   i. The Learned Magistrate erred in law and fact in finding that without the disciplinary minutes, it would be difficult to determine what transpired yet the Appellant filed and produced the said disciplinary minutes during the hearing.

   ii. The learned Magistrate erred in law and in fact by failing to appreciate the evidence tendered by both the Appellant and the Respondent and failing to analyze and apply the correct law thereby arriving at an erroneous conclusion that is not premised on evidence and the law.

   iii. The Learned Magistrate erred in law and in fact in awarding the Claimant the sum of Kshs.16,000.00 being one-month salary in lieu of notice, whereas there was no basis to make the award in view of the evidence presented before the court.

iv. The Learned Magistrate erred in law and fact by awarding the Claimant Kshs. 132,000.00 as six months' compensation for damages for loss of employment, whereas there was no basis to make the award in view of the evidence presented before the court.

v. The Learned Magistrate erred in law and fact by awarding the Claimant Kshs. 16,000/- as leave for the contract period, whereas there was no basis to make the award in view of the evidence presented before the court.

vi. The Learned Magistrate erred in law and in fact in disregarding the submissions made and filed by the Appellant in arriving at judgment in the case.

vii. The order of the trial magistrate is contrary to the weight of submissions, law, and material on record.

4. The Appellant prays that this appeal be allowed by setting aside the judgment in the subordinate court, and in its place, the Respondent's suit in the subordinate court be dismissed with costs. The Appellant further prays that it be awarded the costs of this appeal.

5. Submissions on the appeal were filed for both parties.

The Appellant's Submissions

6. The Appellant submits that it acted in compliance with Section 41 of the *Employment Act* and proved that the Respondent's termination was fair. It sought to rely in the case of *Anthony Mkala Chitavi v Malindi Water and Sewerage Co. Ltd* Industrial Court Case No. 66 of 2012 for the holding that;

> " The employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, in writing or through a representative or shop floor union representative if possible. Thirdly, if it is a case of termination, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanctions."

7. It is the Appellant's submission that the Respondent was issued with a show cause letter, which he responded to and denied the offense, and was later issued with a letter notifying him of a disciplinary hearing on 21st July, 2020. It is further submitted that the disciplinary committee then noted that the Respondent indeed slept at work, and entered a plea of guilty against him after which he was summarily dismissed.

8. The Appellant submits that the Respondent was granted the right to appeal against the decision to dismiss him, and the Appellant therefore complied with Section 45 of the *Employment Act*. Reliance was had to the decision in *Thomas Sila Nzivo v Bamburi Cement Ltd* (2014) eKLR, to buttress this position.

9. The Appellant further submits that the Learned Magistrate appeared to find the termination of the Respondent unfair for lack of the minutes of the disciplinary proceedings. It is its further submission that during the trial on 29.9.2022, the Appellant's witness produced a copy of the minutes of the disciplinary committee held on 21.7.2020 as exhibit 14.

10. Appellant submits that having acted in compliance with Section 41 of the *Employment Act*, the Respondent is not entitled to damages for unfair termination in the sum of Kshs 96,000/-as awarded by the trial court.

11. The Appellant submitted that the learned trial court ought to have dismissed the claim for payment in lieu of termination notice on the premise that it demonstrated clearly that the Respondent's termination was fair

12. The Appellant submits that it produced copies of leave application forms and notification of leave absence, as proof that the Respondent was granted paid leave. It is its submission that this award should therefore be set aside, and the claim for leave dismissed with costs.

The Respondent's Submissions

13. The Respondent's submission is that the trial magistrate determined that based on the evidence and materials placed before him, the Appellant unlawfully terminated the services of the Respondent, and which termination was both substantively and procedurally wrong and proceeded to grant the Respondent the reliefs sought in the memorandum of claim.

14. It is the Respondent's submission that based on Section 12 of the *Employment Act*, his termination was both substantively and procedurally wrong.

15. The Respondent submits that the Appellant did not dismiss him for a lawful cause and that he was not paid his terminal dues. It is the Respondent's submission that the Appellant breached this fundamental provision of the law.

16. It is the Respondent's further submission that the reasons and grounds upon which he was terminated were not valid, and the termination did not meet the provisions of Sections 18(5)(b), 43, 45 of the *Employment Act*, 2007.

17. The Respondent finally submitted that according to the evidence placed before the trial magistrate, his termination was out-rightly unfair and wrongful and which entitles him to the remedies sought in the Memorandum of Claim in accordance with Sections 49 and Section 50 of the *Act*.

18. It is the Respondent's prayer that the Appellant's appeal be dismissed with costs.

Analysis and Determination

19. I have considered the Appellant's Record of Appeal, and the submissions by both parties. The grounds of appeal are summarized as herein below: -

    a. The learned Magistrate erred in law and in fact by failing to appreciate the evidence tendered by both the Appellant and the Respondent and failing to analyze and apply the correct law thereby arriving at an erroneous conclusion that is not premised on evidence and the law.

    b. The Learned Magistrate erred in law and in fact in awarding the Appellant salary in lieu of notice, compensation for unfair termination and the award on account of leave.

20. In *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] EA, Madan JA had this to say on appeals:

> " The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court

of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law: secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

21. Further, in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, while handling a first appeal from the High Court, the Court of Appeal held that:

> "This being a first appeal, we are reminded of our primary role as a first Appellate Court namely, to re-evaluate, re-assess and reanalyze 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"

22. This is a first appeal in this matter, and being so, this court is called upon to reconsider the evidence, evaluate it and draw its own conclusions on whether or not the decision of the trial court should stand. (See *Peters v Sunday Post Ltd* [1985] EA 424)

23. The Trial Court found the Respondent's termination unfair and awarded compensation for the unfair termination. The Appellant's position is that it complied with the requirements of Sections 41, 43 and 45 of the *Employment Act*, 2007, hence the Respondent's termination is fair.

24. For a termination to be considered fair, the law demands that an employer adheres to the twin questions of procedure and substantive justification. The trial court returned a verdict of an unfair termination premised on what it termed as absence of minutes of the disciplinary hearing.

25. The record indicates that the Respondent was issued a show cause letter which he responded to, and was subsequently invited to a disciplinary hearing, and further informed vide the letter of invitation of his right to be accompanied by a fellow employee. The Respondent was heard on the appointed date and a verdict to summarily dismiss him was arrived at and communicated on the same date.

26. The termination procedure has not been challenged, and the record indicates compliance with Section 41 of *Employment Act*. The issue is whether the termination complied with the requirements of Sections 43, 45 and 47(5) on validity of reasons for termination. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the Court held thus:

> "It is now clear that the burden placed on an employer by Section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment."

27. The finding of the trial court was based on the absence of minutes of the disciplinary committee. The record however, does not support this position, as a summary of the minutes was produced in evidence. The issue for me is whether the allegation that the Respondent slept on the job-literally speaking, justifies a summary dismissal.

28. The allegation that the Respondent fell asleep while at work was made by a customer of the Appellant, who was not called to testify on the allegation. The Respondent denied the allegation both in his reply to the show cause as well as during the disciplinary hearing.

29. It is true what they say when they say 'customer is king', and which probably made it easier for the Appellant to belief their customer/client than they would the Respondent. The Appellant needed in my view to do more to show that the allegation made against the Respondent was valid.

30. Further, it is also questionable whether the reason for the summary dismissal is justified. In *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the court held that, indeed the overall design of the law is that the employer has the duty to provide evidence to establish the validity of the termination in terms of Sections 43 and 45 of the *Act*, absent which a presumption of fact arises in favour of the unlawfulness of the termination. Commenting on the interplay between Sections 43 and 47(5) of the *Employment Act*, the Court of Appeal in *Muthaiga Country Club v Kudheiha Workers* [2017] eKLR held thus:-

> "The grievants having denied, through their witness, the reasons given for their dismissal, discharged their obligation under Section 47(5) of the Act by laying the basis for their claim that an unfair termination of employment had occurred. This brought into play Section 43(1) and 47(5) of the Act that places the burden upon the appellant to prove the alleged reasons for termination of the grievants' employment, and justify the grounds for the termination of the employment."

31. In *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR , the Court stated as follows on the burden of proof: -

> "The standard of proof is set out under Section 47(5) of the *Act*. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done, the employer bears the burden of justifying the dismissal. In other words, the respondent bears the evidential burden of rebuttal. If the employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities."

32. In the same breath, the evidence herein, is not sufficient to indicate that the Respondent was sleeping during working hours, and which leads me to the conclusion that the Appellant has not proved the reason for terminating the Respondent, hence the termination is unfair, and I so hold.

33. On the remedies awarded, the trial court awarded the Respondent all the reliefs sought, based solely on the finding of an unfair termination.

34. The Respondent appeared before the disciplinary committee on 21st July, 2020 and was summary dismissed on the same day. This is clear indication that he was not issued notice prior to termination and nothing shows that he was paid in lieu of notice. For this reason, I uphold the finding of the trial court.

35. Although the trial court did not provide the basis for the award of six months' salary in compensation for the unfair termination, this court has equally found the termination unfair, and I find no reason to tinker with the compensatory award made by the trial court. I therefore confirm the award of six months' salary as compensation for the unfair termination.

36. Finally, the court record is awash with leave forms indicating that the Respondent utilized his leave days during the subsistence of his contract. On this basis, I find the award on account of leave devoid of merit and is hereby set aside.

37. In the end, the Court makes orders as follows: -

i. That the finding of an unfair termination is upheld.

ii. The award of one month's salary in lieu of termination notice is upheld.

iii. The award of 6 months salary as compensation for the unfair termination is upheld.

iv. The award on account of leave is set aside.

v. The Appellant will bear half the costs of the suit before the lower court, and each party shall bear their own costs of the appeal.

38. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 15TH DAY OF FEBRUARY, 2024.

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Chuchu holding brief for Ms. Anuro for the Appellant

No appearance for the Respondent

Erwin - Court Assistant.