



**Abeid v Portlink Transport Limited (Appeal E001 of 2022)
[2024] KEELRC 1400 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1400 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E001 OF 2022**

**M MBARŪ, J
MAY 16, 2024**

BETWEEN

KESSY MBARAK ABEID APPELLANT

AND

PORTLINK TRANSPORT LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. C.N. Ndegwa in
Mombasa CMEELRC No.642 of 2019 delivered on 1st December 2021)*

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMEELRC No.642 of 2019 delivered on 1st December 2021. The appellant is seeking orders that the judgment and decree of the trial court be set aside and the appellant be awarded the prayers sought in the Memorandum of Claim and costs of the appeal.
2. Both parties attended court on 11 March 2024 and agreed to address the appeal by way of written submissions. Mention date was allocated for 15 April 2024 to confirm compliance and allocation of a date for judgment.
3. There was no compliance. There are no written submissions.
4. The background of the appeal is a claim filed by the appellant on the basis that on 1st March 2011, he was employed by the respondent as a driver. He worked until 1st August 2018 when the human resources manager, Fahmi Kasozi told him that work had been reduced and hence his employment had been terminated and was served with notice of equal date which was a recommendation letter. Such resulted in unfair termination of employment. Where there was a redundancy, the respondent failed to follow the due process of the law under Section 40 of the *Employment Act*, 2007 (the *Act*). He had no notice or payment of his terminal dues. He claimed the following;



- a. One month notice pay Ksh.28,000;
 - b. Compensation for unlawful termination for 12 months Ksh.336,000;
 - c. Accrued leave Ksh.167,730;
 - d. Rest days Ksh.830,666;
 - e. Public holidays Ksh.175,717;
 - f. House allowance Ksh.373,800;
 - g. Severance pay Ksh.98,000;
 - h. Costs.
5. In response, the respondent denied the claim and stated that where any employee was declared redundant, it met the operational efficacy and selection criteria factored in the employee output, reliability, seniority in time, skill, and ability of the employee per Section 40 of the Act. The appellant was paid his terminal dues and in selecting the employees to be declared redundant, the respondent complied with Section 40 of the Act. The claims made should be dismissed.
6. The learned magistrate in his judgment held there was an unfair termination of employment and awarded the following;
- a. Notice pay Ksh.28,000;
 - b. 2 months compensation Ksh.56,000;
 - c. Costs.
7. The claims for severance pay, house allowance, rest, and public holidays were dismissed.
8. Aggrieved, the appellant filed the appeal on four (4) grounds;
1. The learned magistrate misdirected himself and erred in law and fact by giving a judgment that goes against the weight of the evidence adduced;
 2. The learned magistrate erred in law and fact in raising the standard of proof from that of a balance of probabilities to that of beyond reasonable doubt;
 3. The learned magistrate erred in law and fact in holding that the claimant is not entitled to house allowance when it was clear that he was not provided with housing or any allowance for housing by the respondent;
 4. The magistrate erred in law and fact by holding that the claimant had not proved entitlement to rest days, public holidays, and severance pay when the law was clear that the claimant is entitled to the said claims.
9. As noted above, there are no written submissions by the parties as directed. When the matter came up in court for compliance on 15 April 2024, the court allowed the appellant 4 days to file submissions. At the time of writing judgment, there was no compliance. There were no written submissions filed.

Determination

10. This is a first appeal. On the records, the court has a mandate to re-evaluate the same and make its conclusions.



11. As outlined above, the appellant based his claim on the termination of his employment by the respondent on 1st August 2018. He was told by the human resources manager Fahmi Kasozi that work had been reduced. The respondent in response admitted that there was a redundancy and there was compliance with the provisions of Section 40 of the Act.
12. In evidence, the respondent called its officer, Austin Seth Olale who testified that the appellant was terminated in his employment but the notice was not filed.
13. Olale testified that the company was not doing well and had to terminate some workers. The respondent followed the due process and notified the labour office. He confirmed that the appellant worked from 1st March 2011 to 1st August 2018 and he went on leave but the record was not produced.
14. Work records are the fodder for employment relations. This is a legal duty placed on the employer under Section 10(7) of the Act.
15. This position is addressed by the court in several cases. In the case of *Samwel Shilumba Kwayumba versus Tushar Shar* Cause No.484 of 2013 held that;

The rationale and the requirement for an employer to keep all work records is to be found under sections 8, 9, and 10 of the Employment Act, 2007 which creates a mandatory duty upon the employer to issue an employee with a contract of service spelling out the terms and conditions of employment. Where it is not practically possible to issue such an employment contract immediately, such should be issued within 2 months of commencement of employment.

16. An employment contract does not protect the employee only. Such a contract protects both parties to an employment relationship. It is therefore to the great disadvantage of the respondent as the employer where the claimant was employed and then failed to issue him with a written contract of service as in proceedings such as this the word of the claimant must be believed.
17. Without such records, and in terms of section 10(7) of the Employment Act, 2007 the court must believe the employee. See *Francis Mbugua Muthiga v Echuka Farm Limited* [2018] eKLR; *Abigael Jepkosgei Yator & another v China Hanan International Co. Ltd* [2018] eKLR; and *Mayamba & 5 others & another v Feed the Children Kenya & another* Cause 152 of 2014 & 1227 of 2015 (Consolidated) [2023] eKLR.
18. Without work records, save for the word of the appellant that his employment was terminated due to reduced work is not challenged. This position is confirmed by the respondent in the response that there was a redundancy. The evidence of Mr Olale was an admission of a redundancy.
20. Upon a redundancy situation, the employer is allowed under Section 40 of the Act to reduce its employees. This is a proper and valid reason for termination of employment. However, in termination of employment arising out of a redundancy, the employer must comply with the provisions of Section 40 as outlined.



21. These elements applicable have also been addressed by the Court of Appeal by restating the law and I find the same to be relevant to refer herein. In *Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR the court held that;

It is convenient to begin by setting out the provisions of the *Employment Act* (EA), the *Labour Relations Act* (LRA), and the Collective Bargaining Agreement (CBA) relating to redundancy. Both section 2 of *EA* and *LRA* define redundancy thus:

...

Section 40 of the *EA* deals with termination of employment on account of redundancy and provides:

...

Section 43(1) of the *EA* provides that in any claim arising out of the termination of a contract, the employer shall be required to prove the reason or reasons for termination and where he fails to do so, the termination shall be deemed to be unfair termination within the meaning of sections 45. Section 43(2) provides:

43.

- (2) the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

22. Section 45(1) of *EA* prohibits an employer from terminating the employment unfairly and Section 45(2) stipulates what is unfair termination. It provides:

...

Section 40(1) of the *EA* is merely procedural by its tenor. It has to be read together with sections 43, 45 and Section 47(5) of *EA*. It is implicit from the four sections that to establish a valid defence to a claim for unfair termination based on redundancy, an employer has to prove:

- (I) the reasons or reasons for termination.
- (II) That reason for termination is valid and that ... [emphasis added].

23. Notice must be issued to the employee to be affected by redundancy. Further, an employee who is not unionized must receive a personal notice. Where the events leading to termination of employment cannot be followed in this order, the employer is allowed to pay in lieu of notice.

24. In this case, the respondent has not filed any work records. The response was empty. There was no compliance with Section 10(7) of the *Act*.

25. The learned magistrate made a finding that there was an unfair termination of employment and that this was unlawful. The award of notice pay and compensation was proper and based on the provisions of Sections 43 and 45 of the *Act*.



26. However, upon a redundancy, the same allowed under Section 40 of the Act, the employee affected by such matter is entitled to severance pay for at least 15 days worked for each full year. The learned magistrate in addressing this claim made a finding that;
- c) severance pay
- I make no award because the respondent was paying for the statutory deductions
27. Payment of statutory deductions does not affect payment in severance. This can only relate to service pay and not severance.
28. Upon a lawful redundancy, under Section 40(1)(g) of the Act;
- (1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—
- ...
- (g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.
29. In this case, the appellant worked from 1st March 2011 to 1st August 2018. These are seven (7) full years. There is no payment statement filed by the respondent to confirm the last wage paid. The appellant relied on the wage of Ksh.28,000 per month. This is taken as the correct last wage.
30. For 7 full years worked severance pay is $28,000/30 \times 15 \times 7 = 98,000$.
31. Upon termination of employment, whatever the reason including that of redundancy, the appellant was entitled to his terminal benefits. This ought and should have been assessed.
32. On the claim for house allowance, the learned magistrate held that;
- I make no award since the salary was inclusive of the house allowance.
33. There are no work records filed to confirm the outline of the wages paid. There is no payment statement filed.
34. Under the Wage Orders applicable in the year 2018, a driver placed in Mombasa had a minimum wage of Ksh.18,319.50 for light vehicles Ksh.23,039.40 for medium-sized vehicles, and Ksh.30,627.45 for heavy commercial drivers.
35. The appellant does not state which category of vehicle he was driving. His claim statement and evidence-in-chief do not bring out this matter with clarity. The wages for a driver being different, he had a duty to particularise his claims accordingly.
36. As this is a matter of fact, such fact should and ought to have been addressed by the appellant as the claimant. The finding by the learned magistrate that he failed to particularise these claims cannot be faulted.
37. On the claim for payment of rest days, this is due under the provisions of Section 27 of the Act. every employee is entitled to a rest day each week. The employer has the legal duty to file work records on how the employee enjoyed this right.
38. Without work records, this being a continuing injury, the appellant was entitled to claim for all unpaid dues at the end of his employment within the meaning of Section 90 of the Act. The daily wage for a



driver in Mombasa under the Wage Orders, 2018 was Ksh.164.40 which is inclusive of all due benefits. For a total of 52 weeks, the total due is Ksh.368 weeks x 164.90 per day = 60,023.60 in rest days pay.

39. On the claim for pay during public holidays. These are days gazette by the Minister. Work during such days should be particularized by the employee. To this extent, the findings by the trial court cannot be faulted.
40. Taking annual leave is a right under Section 28 of the Act. once claimed, the employer should file the work records to confirm payment or that the employee enjoyed such annual leave. However, under Section 28(4) of the Act, the employee is not allowed to accumulate annual leave days beyond 18 months unless with approval from the employer. In this regard, the appellant is only entitled to leave pay for 33 days only.
41. On the wage of Ksh.28,000 per month, he had 21 leave days paid at Ksh.19,600.
42. On the claim for costs, the award of costs in employment claims is discretionary. The court should give reasons for awarding costs. Without any written submissions. For the appeal, each party bears its costs. For the lower court, costs as awarded.
42. As analyzed above, the appeal is with merit and the judgment in Mombasa CMELRC No.642 of 2016 is hereby reviewed in the following terms;
 - a. Notice pay Ksh.28,000;
 - b. Compensation Ksh.56,000;
 - c. Severance pay Ksh.98,000;
 - d. Rest days Ksh. 60,023.60;
 - e. Accrued leave Ksh.19,600;
 - f. Each party is to bear the costs of the appeal. Costs for the trial court as awarded.

DELIVERED IN OPEN COURT AT MALINDI ON THIS 16 DAY OF MAY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

