



**Mungai v Gitau t/a Naramat Academy (Civil Appeal E084 of 2022)
[2024] KEELRC 1262 (KLR) (16 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1262 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E084 OF 2022**

L NDOLO, J

MAY 16, 2024

BETWEEN

JOSEPH NDUNGU MUNGAI APPELLANT

AND

NJOGU GITAU T/A NARAMAT ACADEMY RESPONDENT

*(Appeal from the judgment of Hon. A.M Obura, CM delivered
on 9th June 2021 in Milimani CMEL No. 1206 of 2019)*

JUDGMENT

1. The Appellant in this appeal worked for the Respondent as a security guard. His case before the lower court was that on 29th March 2019, he sought and was granted permission to attend a funeral service. Upon resuming duty, the Appellant learnt that a theft had occurred at his place of work.
2. The Appellant was instructed by his employer to go and record a statement at Matasia Police Station but he claimed that the Police informed him that his statement was not required since he was not on duty at the time the theft occurred.
3. In his claim before the trial court, the Appellant sought compensation for loss of employment plus terminal dues.
4. The Respondent's line of defence before the trial court, was that the Appellant himself absconded duty, following a theft at his place of work.
5. By her judgment delivered on 9th June 2021, Hon. A.M Obura, CM dismissed the Appellant's claim. Being dissatisfied with the decision of the trial court, the Appellant proffered the present appeal.



Duty of First Appellate Court

6. This being a first appeal, I am guided by the Court of Appeal decision in *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123 where the duty of a first appellate court was established in the following terms:

“An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it 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, this 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.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

The Appeal

7. In his Memorandum of Appeal dated 30th June 2022, the Appellant raises the following grounds of appeal:
- a. The learned Magistrate erred in law and fact by holding that the Appellant failed to prove that he was terminated or unlawfully dismissed and that the claim was an afterthought, the Appellant having left employment on 9th April 2018 and the suit having been filed in September 2019, without considering that the suit was filed within the statutory period of three (3) years under Section 90 of the *Employment Act*;
 - b. The learned Magistrate erred in law and fact in failing to award the Appellant overtime despite the fact that the Respondent admitted in its defence, under paragraph 10 that the Appellant worked overtime;
 - c. The learned Magistrate erred in law and fact in failing to award the Appellant pay for public holidays worked despite the Respondent having admitted under paragraph 12 of the defence that the Appellant worked during public holidays but failed to prove payment for the same;
 - d. The learned Magistrate erred in law and fact in failing to award the Appellant house allowance as required by the mandatory provisions of Section 31 of the *Employment Act*, despite the fact that the Respondent did not prove payment of the same to the Appellant;
 - e. The learned Magistrate erred in law and fact in failing to award the Appellant service gratuity as required by the provisions of Section 35 of the *Employment Act*, in the absence of evidence of his membership to the National Social Security Fund (NSSF) or any other retirement benefit scheme;
 - f. The learned trial Magistrate erred in law and fact in failing to make a finding that the termination of the Appellant was unlawful and unfair;
 - g. The learned Magistrate erred in law and fact by not considering the facts, evidence and submissions made by the Appellant and therefore treating the Appellant’s case casually which led to a miscarriage of justice;
 - h. The learned trial Magistrate erred in law and fact by failing to consider and have due regard to the Appellant’s case and to the facts and evidence presented in support thereof;



- i. The learned trial Magistrate erred in law and fact in dismissing the Appellant’s claim on grounds that the Appellant did not state, in his pleadings, when he was terminated.
8. The grounds of appeal may be condensed into two segments as follows:
- a. Unlawful termination or desertion of duty;
 - b. Terminal dues.

Unlawful Termination or Desertion of Duty

9. In her judgment, the learned trial Magistrate drew the following conclusion:

“I find that the Claimant failed to prove that he was terminated or unlawfully dismissed. I find that his claim is an afterthought having left employment and only considered pursuing this claim much later in September 2019 yet he alleges that he was dismissed on 9th April 2018.”

10. It would appear that the learned trial Magistrate took into account the period taken by the Appellant before coming to court to reach the conclusion that he had no valid case against the Respondent. In my respectful view, this was an error of law because employment claims have their own limitation period set by Section 90 of the *Employment Act* and the Appellant’s claim was well within time.
11. Additionally, the learned trial Magistrate did not apply the well-established principles of dealing with cases of alleged desertion of duty. There are many decisions of this Court that would have provided guidance in this regard.
12. In *Godfrey Anjere v Unique Suppliers Limited* [2015] eKLR it was held that an employer stating that an employee has deserted duty must demonstrate efforts made to reach out to the employee to resume duty, while putting them on notice that termination of employment may result from their desertion.
13. In its decision in *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR this Court stated as follows:
- “Desertion of duty is a grave administrative offence which if proved, would render an employee liable to summary dismissal. It is however not enough for an employer to simply state that an employee has deserted duty. The law is that an employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration.”
14. The Respondent did not adduce any evidence to prove its assertion that the Appellant had deserted duty and the Appellant’s claim that his employment was terminated verbally in violation of due process was not debunked. The trial court therefore, ought to have ruled in favour of the Appellant in this regard, thus allowing the claims for compensation and notice pay.

Terminal Dues

15. Under this head, the Appellant claimed house allowance, service gratuity, overtime, off duty, public holidays, salary deductions, leave pay and underpayment. The only thing to say is that these claims, being within the category of special damages, ought to have been specifically pleaded and proved.



16. I have looked at the Appellant’s pleadings as filed and evidence adduced before the trial court and find that the standard of proof for special damages was not met. I therefore have no reason to interfere with the findings by the learned trial Magistrate under this head.

Final Orders

17. Finally, I set aside the order disallowing the Appellant’s claim for unlawful and unfair termination and substitute it with an award of twelve (12) months’ salary in compensation.

18. In making this award, I have taken into account the Appellant’s long service and the fact that he did not contribute to the termination. I have further considered the Respondent’s failure to afford the Appellant an opportunity to be heard, prior to termination.

19. In addition, I award the Appellant one (1) month’s salary in lieu of notice as provided under Section 35(1)(c) of the *Employment Act*.

20. The cumulative award in favour of the Appellant is as follows:

- a. 12 months’ salary in compensation.....Kshs. 156,000
- b. 1 month’s salary in lieu of notice.....13,000
- Total.....169,000

21. The Respondent will meet the costs of this appeal and the proceedings in the court below.

DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF MAY 2024

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JUDGE

Appearance:

Mr. Nyabena for the Appellant

Ms. Gichuki for the Respondent

