



**Eyasu t/a Eyasu Garage v Akuno (Appeal E160 of 2022)
[2024] KEELRC 2158 (KLR) (16 August 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2158 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E160 OF 2022**

**J RIKA, J
AUGUST 16, 2024**

BETWEEN

EYASU T/A EYASU GARAGE APPELLANT

AND

JAPHETH LUKA AKUNO RESPONDENT

*(An Appeal from the Judgment of the Chief Magistrate's Court at
Milimani Commercial Courts, Nairobi, Hon. H.M. Nyaberi [Mr.] Chief
Magistrate, dated 8th September 2022, in CMELRC NO. 155 OF 2018)*

JUDGMENT

1. The Respondent herein was the Claimant in the Claim before the Trial Court.
2. He presented the Claim against the Appellant herein, his former Employer, claiming that the Appellant unfairly and unlawfully terminated his contract.
3. He asked the Trial Court to grant him orders for payment of compensation for unfair termination, terminal benefits, costs and interest.
4. In its Judgment, the Trial Court found in favour of the Respondent herein, granting him salary in lieu of notice; annual leave; house allowance; and compensation for unfair termination, all added up at Kshs. 697,541. He was granted the prayer for costs and interest.
5. The Appellant was disaffected, and filed this Appeal, through a Memorandum of Appeal dated 22nd September 2022.
6. 7 Grounds of Appeal are outlined. They are, that: The Trial Court erred in finding that termination was unfair and unlawful; it erred in failing to find that the Respondent deserted duty; it erred in not finding that the Respondent was paid his terminal dues though a deserter; the award of annual leave



was in error; the award of house allowance was in error; the award of notice and compensation was unfounded; and, Judgment was unfair, unjust and excessive.

7. Parties agreed that the Appeal is considered and determined on the basis of the Record of Appeal and Written Submissions. They confirmed filing and exchange of Submissions, at the last appearance before the Court, on 5th April 2024. The Court granted an order for stay of execution pending determination of the Appeal, at that last appearance.

The Court Finds: -

8. There is nothing on record to suggest that the Trial Court erred, in finding the Appellant to have terminated the Respondent's employment, unfairly and unlawfully.
9. The Appellant's position was that the Respondent deserted; his contract was not terminated at the instance of the Appellant.
10. Eyasu Wolde Gabriel, the Appellant herein told the Court that the Respondent did not report for duty from January 2018 to May 2018. The Respondent testified that he had been reporting, but not receiving his salary. It was common ground that the Parties were summoned before Chief, Eastleigh South, on 10th May 2018.
11. The Respondent had reported the Appellant there, for non-payment of salary.
12. According to the Respondent, and this is confirmed by the Appellant, the Appellant paid him Kshs. 50,000, upon the intervention of the Chief.
13. The Respondent was available at the Chief's Office on 10th May 2018. The Appellant was there too. The Appellant does not appear to have complained about the Respondent's desertion before the Chief. The Trial Court correctly concluded that the Appellant had an obligation in law, to institute disciplinary process against the Respondent, if it was true that the Respondent had deserted.
14. The Trial Court did not err in finding that termination was instigated by the Appellant, and that there was no valid reason. Procedure was not in conformity with the standards of fairness prescribed under Sections 41 and 45 of the [Employment Act](#).
15. The award of compensation equivalent of 3 months' salary and notice of 1 month, was not legally faulty. It was a modest compensatory award.
16. The award of annual leave for the period December 2008 to May 2018 was unmerited. The Respondent was injured in South Sudan in January 2018. He returned to Kenya and did not actively drive for the Appellant, for the period January 2018 to May 2018. He reported for duty and signed attendance register, which the Court would find was a reasonable explanation from him, warranting payment of his monthly salary. But he was not driving and was effectively doing no work. His vehicle was parked at the garage. He was resting as he would, on annual leave. His colleague Simon, who testified for the Appellant, told the Court that the Respondent was used to leaving the workplace, without notice to the Appellant. Simon, whose evidence the Trial Court does not seem to have given adequate weight, also testified that the drivers were not on the road full-time. They made about 6 trips in a year. When there was no work, they stayed at home. They rested. The purpose of annual leave, is to afford an Employee time to rest and recharge. The Claimant rested for months, during which he continued to draw a monthly salary.
17. Grant of annual leave pay, does not seem to have been justified, for an Employee who was not doing meaningful work, after his injuries sustained in South Sudan, and one who ordinarily made only about 6 trips annually. He was not driving in continuity. Award of Kshs. 164,791 in annual leave is set aside.



18. In his evidence, the Appellant told the Trial Court that, “ I did not give him a house, but gave him mileage. He used to stay in his house.”
19. The Trial Court addressed the prayer for house allowance adequately, correctly interpreting and applying Section 31 of the *Employment Act*. The Appellant did not establish that the salary paid to the Respondent, included house allowance. Mileage allowance could never be a substitute for house allowance. The formula adopted, at 15% of the monthly basic salary paid to the Claimant, is founded on the law, and was never challenged by the Appellant.
20. In summary, Grounds 1, 2,3, 5 and 6 of the Memorandum of Appeal are rejected. To the extent that the Respondent was awarded annual leave pay, the Court would agree with Ground 7, that the Judgment was somewhat unjust. Ground 4 is sustained.

It Is Ordered: -

- a. Grounds 4 and 7 of the Memorandum of Appeal are sustained, and the award of annual leave pay at Kshs. 164,791, set aside.
- b. No order on the costs of the Appeal.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 16TH DAY OF AUGUST 2024.

JAMES RIKA

JUDGE

