



**Board of Management Sheikh Zayed Children Welfare Center v Ismail (Employment and Labour Relations Appeal E005 of 2024) [2024] KEELRC 2462 (KLR) (11 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2462 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E005 OF 2024**

**M MBARŪ, J  
OCTOBER 11, 2024**

**BETWEEN**

**THE BOARD OF MANAGEMENT SHEIKH ZAYED CHILDREN WELFARE  
CENTER ..... APPELLANT**

**AND**

**SHARIFA KASSIM ISMAIL ..... RESPONDENT**

*(Being appeal from the judgment of D.O. Mbeja delivered on  
16 November 2023 in Mombasa MCELRC No. E435 of 2022)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 16 November 2023 in Mombasa MCELRC No.435 of 2022. The appellant is seeking an order that the judgment be set aside with costs on the basis that;
  1. The trial court erred in law and fact by finding that the claimant (respondent) had proved that termination was unfair and unlawful.
  2. The trial court erred in law and fact by holding that the respondent was liable for unfair termination.
  3. The trial court erred in law and fact by awarding the clamant terminal dues when she had failed to prove the same.
  4. The trial court erred in law by failing to evaluate the evidence on record and hence arrived at a wrong conclusion.
  5. The trial court erred in law and fat by taking into account irrelevant matters into consideration hereby arriving at a wrong conclusion.



2. The background of the appeal is a claim filed by the respondent on the basis that she was employed by the appellant as a teacher in a private nursery and primary school on Islamic education and an orphanage. The respondent worked from 8 May 2014 until 11 January 2022 when employment was terminated. An employment contract was issued from 1<sup>st</sup> May 2014 to 30 April 2016, 1<sup>st</sup> January 2017 to 31<sup>st</sup> December 2018 and the last contract from 1<sup>st</sup> January 2019 to 31<sup>st</sup> December 2020. In the period from January 2021 to January 2022, the respondent had no written contract of employment and continued to work under previous terms of employment at a gross wage of Ksh.34, 000 per month.
3. The respondent also claimed that the work hours were from 7 am to 4.30 pm for 5 days each week and on Saturday from 6 am to 1 pm. There was no leave allocated for the entire period of work. On 11 January 2022, the respondent reported at work and the director called her and issued her with notice terminating her employment. There was no notice or reasons given or payment of terminal dues and claimed the following orders;
  - a. Notice pay Ksh.34,000;
  - b. Leave for 7 years Ksh.116,600;
  - c. Service pay for 7 years Ksh.119,000;
  - d. 12 months compensation Ksh.408,000;
  - e. Certificate of service;
  - f. Costs of the suit.
4. In response, the appellant denied the claims and that the respondent was employed on a renewable contract basis on 16 January 2014 with renewals until 31<sup>st</sup> December 2020. In the year 2021, the appellant took a restructuring given the COVID pandemic and hence did not renew any contract of the employees but proceeded with the terms of the contract expired.
5. The respondent would take annual leave save for the year 2020 when schools were closed and at the time employment was terminated, she had utilized all her leave days. The respondent absconded duty on several occasions and was warned both verbally and in writing by the appellant but failed to take heed. The respondent refused to report to work on 3 January 2022 when schools opened. She was summoned to defend herself and after a hearing, the disciplinary committee concluded that the report was to be considered during the renewal of the contract. On 11 January 2022, the appellant declined to renew the contract based on a disciplinary report and hence issued the respondent with notice terminating employment. A one-month notice was issued expiring on 11 February 2022 and all terminal dues were paid but the respondent has declined to collect.
6. The trial court heard the parties and held that there was unfair termination of employment and the claims made justified which were awarded as pleaded with costs and interests.
7. On the appeal, both parties attended and agreed to address the same by way of written submissions.
8. The appellant submitted that the trial court erred in the findings and the entire judgment should be set aside with costs. The appellant's witness testified that the respondent absconded duty which amounted to gross misconduct. In the case of *Matsepho v Newton* Case No. 9 Of 2019 (2022) eKLR, the Court held that Section 44 of the *Employment Act* is clear that an employer is entitled to summarily terminate an employee for gross misconduct without notice or if he elects, with less notice than that contemplated under section 35. In effect, the termination, in so far as it was not with the benefit of notice in terms of section 35 of the Act does not attract service pay.



9. The respondent was not entitled to the awards granted. The Appellant testified that the Respondent was paid her salary and dues up to the date of termination. Leave allowance is not payable because teachers normally utilize holidays as leave. The respondent was not in any contact at the time employment was terminated. She was a casual worker without a contract who only earned a monthly salary without any other benefit.
10. The Respondent was summarily dismissed and therefore she is not entitled to service pay. Further, the Respondent could not earn compensation for alleged unlawful termination at 12 months when she was on casual employment. The Respondent was only entitled to the one-month salary in lieu of notice. She was not entitled to any other pay on the title of terminal dues.
11. The respondent submitted that this appeal is invalid and filed out of time contrary to the rules. The trial court delivered judgment on 16 November 2023 and the Memorandum of Appeal was only filed 2 February 2024. Under Section 79G of the Civil Procedure Act. A party that wishes to file an appeal out of time must seek leave through a miscellaneous application. An appeal should be filed within 30 days from the date of the judgment which the appellant failed to address or seek leave to move the court for more time to comply. The Memorandum of Appeal should have been filed on or before 16 December 2023.
12. The respondent submitted that she was able to prove that her employment was terminated unfairly. The appellant was employed as a teacher under a written contract ending 31<sup>st</sup> December 2020 and no other written contract was issued. Events leading to 11 January 2022 are that the respondent reported to work and the director issued a termination notice without due process. The alleged absence from duty was without proof. All off days were with approval. Under Section 47(5) of the Employment Act, the respondent discharged the burden that she suffered unfair termination of employment while the appellant failed to prove that justified grounds were leading to termination of employment as held in *Cooperative Bank of Kenya Limited v BIFU [2017] eklr*.
13. Upon termination of employment for lack of due process, a party should be paid all terminal dues as held in the case of *Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eklr*. The documents filed by the appellant indicating there were disciplinary proceedings report of 11 December 2021 do not show that the respondent was invited or allowed a fair chance to defend herself. In the case of *Hosea Akunga Ombwori v Bidco Oil Refineries Limited [2017] eklr* the court held that under Section 41 of the Employment Act, an employee should be allowed a fair chance and opportunity for a hearing. In this case, there was no due process leading to unfair termination of employment and the appeal being invalid should be dismissed with costs.

### **Determination**

14. This is a first appeal. The court is required to re-evaluate the entire record of appeal, re-assess the evidence and make its conclusions but take into account the trial court had the opportunity to hear the parties in evidence.
15. In the written submissions, the respondent has raised the issue of the appeal being filed out of time. This is a legal issue which should have been raised instantly and before the court delved into any matter or filing of written submissions.
16. On 12 April 2024, the respondent attended court and did not raise the issue.
17. Other attendances on 13 and 28 May 2024, 12 June 2024, 9 and 29 July 2024 and on all these attendances, no legal issue(s) was raised.



18. However, it is imperative that the question of an appeal filed out of time be addressed first.
19. The judgment of the trial court the subject of this appeal was delivered on 16 November 2023.
20. The Memorandum of Appeal herein was filed on 2 February 2024.
21. Under the provisions of Order 50 Rule 4 of the Civil Procedure Rules, in tabulating time, a party is allowed to remove days which are not part of the court schedule.
22. More specifically, Order 50 Rule 4 is concerned with the computation of time for the court's Christmas recess. It stipulates;

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleadings or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.

23. In this case, from 16 November 2023, there were 10 working days in November 2023. There were 13 days in December 2023 and 12 days in January 2024. In total, the appellant had 35 days.
24. Under Section 17 of the *Employment and Labour Relations Court Act*, Rule 8 of the Employment and Labour Relations Court (Procedure) Rules read together with Section 79G of the *Civil Procedure Act*, the appellant was required to file the appeal within 30 days from the day the judgment was delivered.
25. The import of filing an appeal out of time renders it invalid.
26. Under Section 79G of the *Civil Procedure Act*, a party who is caught up in time for one reason or the other is allowed to file an application seeking more time before filing its appeal out of time.
27. These provisions are meant to secure the integrity of court procedures and proceedings. To file an appeal out of time without leave and despite the respondent not addressing such a matter in time is a legal question that cannot sanitize the appeal at this stage.
28. Going into the filed written submissions at this stage is purely academic.
29. Accordingly, the appeal being invalid is hereby struck out. The respondent failed to address the issues expeditiously. Each party is to bear its costs.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 11 DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

