

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

APPEAL NO. E 247 OF 2024

PORTSIDE FREIGHT TERMINALS LIMITED.....
APPELLANT

VERSUS

MWANGANGI CHARO WANGANGI.....
RESPONDENT

[Being an Appeal against the Judgement and Decree of Hon.Noelyne Reuben
Principal Magistrate, in MCELRC NO. 163 of 2020, dated and delivered on 15th
November 2024]

JUDGMENT

Background

1. Asserting that at all material times he was employed by the Appellant as a heavy commercial vehicle driver whose employment was unfairly terminated, the Respondent sued the Appellant in the trial court in the suit mentioned above, claiming various reliefs against them. After hearing

the parties on their respective cases, the trial court, through its judgment dated 15th November 2024, found in favour of the Respondent, declaring that the termination of his employment was unfair, and awarded him various reliefs.

2. Aggrieved by the judgment, the appellant challenged the decision on the grounds outlined in their memorandum of appeal filed herein, dated 20th November 2024.
3. The Respondent cross-appealed, through a memorandum dated 21st November 2024.
4. In accordance with the directives of this Court, the appeal was argued through written submissions.

The Respondent's Case Before the Trial Court.

5. It was the Respondent's case that he was employed by the Appellant as a heavy commercial truck driver on or about 1st May 2015, earning a monthly salary of KShs. 921. He remained in the employment of the Appellant until 30th September 2019, when they unlawfully and unfairly terminated his employment without notice.

6. Before the termination, he had dutifully and dedicatedly rendered his services to the Appellant. There had been no complaint against him. He had not had any disciplinary issues. The Appellant effected the termination, without first affording him an opportunity to defend himself. No disciplinary hearing was undertaken against him.
7. He further asserted that he had not committed any infraction that would be a basis for the termination of his employment by the Appellant.
8. After dismissing him, the Respondent refused to pay him his terminal dues. The Respondent asserted that, in the circumstances, he was entitled to compensation for unfair and unlawful termination and terminal dues, thus:

a) A declaration that the dismissal against him by the respondent was unlawful, illegal, unfair and unjust.

b) 2 months' pay in lieu of notice (KShs. 35,222x2]
..... KShs.70,444.

c) Unpaid annual leave (35,222/26x21x4) ...KShs.
113,794

- d) Service pay for 4 years worked
 KShs. (35,222/2x4) years.....KShs.
 70,444
- e) Damages under Section 49 of the employment
 Act (KShs. 35,222x12 months) KShs. 422,664
- f) Salary underpayment (KShs.35,222-
 kshs.20,921=kshs.14,301 x12x5)
kshs.858,060
- g) Public holidays (KShs. 169 per hour x 2 x 12 hrs X
 11 days X4 years)KShs. 178,464
- h) Unpaid overtime worked 24 hours per month
 Xkshs.169/hrsX1.5 X54 months)KShs.316,368
- i) Certificate of service
- j) Interest on the amounts awarded
- k) Cost of the suit

The Appellant's case.

9. The Appellant presented one witness, its General Manager, to testify on their behalf. He testified that he oversees all the Appellant's activities, including employment and dismissal of employees.

10. He stated that the Appellant employed the Respondent until 31st July 2019, when he voluntarily and without notice ceased his employment. Consequently, it is not accurate to claim that the Respondent was dismissed or terminated by the Appellant as alleged. Subsequently, the Respondent did not communicate until he, through his Counsel, issued them with a demand letter for unlawful dismissal from employment.
11. The appellant voluntarily relinquished and terminated his employment. Consequently, the substantive and procedural fairness protections assured under sections 35, 40, 41, and 45 of the Employment Act did not apply to him.
12. The Respondent was a casual seasonal truck driver, working only on demand, so a formal contract wasn't needed. Like other casual workers, he was paid pro rata monthly, based on the days he worked.
13. Being a seasonal employee, the Respondent was not entitled to benefits under the Employment Act, such as an itemised pay statement, annual leave, notice of

termination of employment, or any other reliefs related thereto.

14. In any event, there was not a definitive employment relationship between the Respondent and the Respondent. At all material times, the Respondent was an independent contractor who was paid for work done, although the payments were cumulative at the end of the month.
15. The witness contended that the Respondent was not entitled to the two (2) months' pay in lieu of notice for the reason that he voluntarily left his duties without notifying the Respondent. Additionally, he would not be entitled to compensation for unpaid annual leave for two reasons: first, he forfeited any leave he may have had, as he did not apply for it at any time, and his application was denied. Secondly, he was a casual labourer only paid for the work done.
16. The witness further contended that the Respondent was not entitled to service pay as he was not declared redundant. Furthermore, he was a member of the National

Social Security Fund and was therefore not entitled to the benefit under Section 35(5) of the Employment Act.

17. The Respondent did not have any evidence to establish overtime worked, salary payment or work done on holidays.
18. The witness asserted that the certificate of service allegedly issued by the Respondent Company and signed by one Abu-Bakr Said was a forgery and did not emanate from the Appellant. Abu-Bakr Said was never an employee of the Appellant. This aspect of forgery was reported to Makupa Police Station and recorded at OB-22/2/2/2021.

The Judgment by the Lower Court.

19. After hearing the parties on their respective cases, considering their evidence, and submissions, the learned trial Magistrate entered Judgment for the Respondent against the Appellant, declaring that his employment was unfairly terminated, awarding him one month's notice pay, KShs. 20,291, compensation for earned but unutilized leave days, KShs. 85,346 and compensation for unfair

termination of employment, twelve months' gross salary, KShs. 243,492.

The Appeal

20. Dissatisfied with the Judgment of the lower Court, the Appellant filed the instant appeal, setting forth the following grounds;
 - a. The learned trial magistrate erred in law and fact by failing to address the issue of whether an employment contract arose between the Respondent and the Appellant, and if so, to determine the specific terms of the said contract.
 - b. The learned trial magistrate erred in failing to decide as to whether the Respondent was engaged by the Appellant on Contractual or casual terms of employment, despite this being a central issue for determination.
 - c. The learned trial magistrate erred in disregarding the Appellant's Memorandum of Response, particularly the averment that the Claimant was a seasonal employee who had served the Appellant for only two months.

- d. The Learned trial magistrate erred in finding that the Appellant was in breach of the terms of employment without first ascertaining the terms of the alleged employment contract.
- e. The learned trial magistrate erred in law and fact in awarding benefits associated with the Employment Act, 2007, including payment in lieu of notice, compensation for leave, and damages for unlawful termination, without a proper determination of the existence and terms of the employment relationship.
- f. The learned trial magistrate erred in concluding that the Appellant had created a hostile working environment, thereby implying constructive termination of employment, without sufficient evidence to support such a finding.
- g. The learned trial magistrate erred in holding that the Respondent had issued a termination notice and subsequently resigned from employment, whereas the Respondent had averred that he was dismissed by an individual known as Shem, who was allegedly unknown to the Appellant.

- h. The learned trial magistrate erred in shifting the burden of proof to the Appellant regarding Claimant's claim for unutilized leave, contrary to established legal principles.
- i. The learned trial magistrate erred in arriving at an inordinately high award of damages, which was excessive and unjustified in light of the evidence presented.
- j. The learned trial magistrate erred in failing to apply the principles laid out in precedents regarding constructive dismissal and lawful termination as outlined under Sections 43, 45, and 47 of the Employment Act, 2007.
- k. The learned trial magistrate erred in failing to take into consideration the fact that the Claimant's alleged resignation, if any, was voluntary and not compelled by any action or omission of the Respondent.
- l. The learned trial magistrate erred in failing to properly evaluate the evidence and submissions tendered by the Appellant, resulting in findings that were against the weight of evidence.

The Cross Appeal

21. Dissatisfied with the Judgment of the trial Court, the Respondent lodged a cross-appeal, setting out the following principal grounds;

- a) The Honourable learned Magistrate erred in fact and law by failing to award the prayer of underpayment despite all the evidence produced in support of the minimum wage provisions.
- b) The Honourable learned Magistrate erred in law and fact by failing to make the terminal dues calculations with the proper minimum wage salary as a heavy commercial vehicle, despite the judicial notice on underpayment.
- c) The Honourable learned Magistrate erred in fact and in law by failing to award service pay for all the years worked despite the Respondent failing to remit deductions to NSSF.
- d) The Honourable learned Magistrate erred in fact and law in failing by not awarding unpaid overtime, rest days and public holidays worked despite the Claimant rendering evidence on that effect.

e) The Honourable learned Magistrate erred in law and in fact by failing to consider the Cross-Appellant's submissions on house allowance and judicial authorities on terminal dues, thereby arriving at an erroneous figure.

Analysis and Determination

22. From the outset, it is essential to emphasise that this Court acknowledges its function as a first Appellate Court to review the material presented before the trial Court with a fresh perspective, as if these proceedings were a de novo hearing, and to arrive at its own independent conclusions. Nevertheless, in fulfilling this role, I shall bear in mind that I did not observe or hear the witnesses testify, and I will duly accommodate this consideration.

23. I have carefully considered the pleadings, oral and documentary evidence, by the parties before the trial Court and the grounds of the appeal by the Appellant, and cross-appeal by the Respondent, and conclude that the appeal and cross-appeal turn on the following principal issues:

I. What was the nature of the Respondent's

contract of employment with the Appellant?

II. How did the separation in the employer-employee relationship between the Appellant and the Respondent occur?

III. Was the Respondent entitled to the reliefs sought?

24. Before proceeding to examine the identified issues for determination, I am compelled to make a statement regarding two points raised in the Appellant's grounds of appeal and submissions. However, they do not fall under the three principal issues mentioned above. Without hesitation, I point out that the matters raised are valid.

25. The Appellant's Counsel argued that the learned trial Magistrate inexplicably discussed the matter before her as though it was anchored on, and determined the same based on, the doctrine of constructive dismissal.

26. I have carefully reviewed the judgment by the learned trial Magistrate; indeed, it extensively discusses the doctrine of constructive dismissal and, undoubtedly, the decision therein is based on this doctrine. I have further examined the pleadings, the evidence, and the submissions before the trial Court, and

note that none of these documents explicitly or implicitly raise the issue [constructive dismissal], as one of the issues that required the Court's interrogation and determination. I am unable to fathom how the learned trial Magistrate ended up in the discussion. It was a misdirection for the trial Magistrate to frame and determine an issue which did not flow from the pleadings.

27. Judicial judgments must necessarily draw their issues for determination from pleadings, evidence, and issues raised during the proceedings, and where it is clear that those issues which are such, raised, have been left for the Court to render itself on them, see **Odd Jobs vs Mubia [1970] EA 476.**

28. In **Civil Appeal No. 5 of 2014, Mburu K. Muringa vs Municipal Council of Mombasa**, the Court of Appeal, stated;

“It cannot be gainsaid that the purpose of pleadings is to inform both parties of the issues in dispute so that they can prepare themselves and lead evidence on those issues [see Gandy v Caspar Air Charters Ltd [1956] 23 EACA, 139]. Accordingly, it is a misdirection for the court to frame and determine issues which do not flow from the pleadings or which the parties have

not addressed. A court can only so proceed if it is clear that the parties have canvassed a matter, which was not in pleadings, made it an issue and left it to the court to decide. See [odd Jobs v Mubia, 1970] EA 476]. In this appeal, the parties had not made the existence of a binding contract between them an issue for determination, and did not leave it to the Judge to decide. Accordingly, the learned Judge ought not to have ventured into that thicket.”

29. In Independent Electoral and Boundaries Commission & another v Mule & 3 others [KECA] 890 [KLR], cited by Counsel for the Appellant, the Court of Appeal stated;

“7. Lord Denning was, of course, alluding to the essential difference between an adversarial system of Justice such as we have, in which the judge is or ought to be more of an umpire and the inquisitorial system, where the Judge is an active investigator after evidence and truth. The good law Lord had proceeded to quote Lord Green, MR, who had explained that justice is best done by a judge who holds the balance

between the contending parties without himself taking part in their disputations, for, by descending into the arena, the Judge is liable to have his vision clouded by the dust of conflict. See Yuill v Yuill [1945] ALL ER 183.

30. In the judgment, the trial Magistrate thoroughly examined the matter of employee resignation and its connection to the doctrine of constructive dismissal. Given the circumstances relevant to the case before her, such an analysis was unnecessary and potentially confusing.
31. I now turn to the three issues identified hereinabove for determination.

What was the nature of the employment relationship between the Appellant and the Respondent?

32. There was no dispute before the trial Court that at some point, the Respondent was engaged by the Appellant as a heavy commercial vehicle driver. However, there was controversy over the nature of his engagement with the Appellant. He contended that his engagement was indefinite in form. This is what he pleaded, asserted in

evidence and maintained in his submissions.

33. The Appellant, in my view, was not sufficiently specific regarding the nature of the engagement. This observation should be evident to anyone reviewing the Appellant's pleadings, evidence, and submissions before the trial court.
34. This controversy was vital for the learned trial Magistrate to resolve, considering the fact that the nature of employment would always inform the reliefs to be availed to an employee, in a dispute like the instant one, considering how the Employment Act, 2007, is designed.
35. In paragraph 3 of the Statement of Claim, the Respondent averred;

"At all times relevant to this claim, the Claimant worked for the Respondent continuously from 1/5/2015 to 30/9/2019.

36. The Appellant in paragraph 3 of their statement of Response, responded;

"Paragraph 3 and paragraph 4 of the Memorandum of Claim is denied in their entirety

and to the extent that it is pleaded that the Claimant worked continuously for the Respondent from May 2016-July 2019. The Respondent avers that the Claimant reported to his assigned work station until 31st July 2019 and thereafter without informing his supervisors and or his superiors, has never returned to work. “

37. What one gets from the foregoing paragraph of the Memorandum of Response is that there is an implicit admission that the Respondent was engaged from May 2016. However, it is important to point out that the Appellant's witness, in paragraph 3 of his witness statement, makes an express admission that the engagement was between the period May 2016 and July 2019.

38. The witness contended in his witness statement that during this period, he was engaged as a casual truck driver working seasonally, not continuously, only on days when work would demand. Like any casual employee in the Company, his salary would be paid on a pro rata basis

at the end of the month, depending on the number of days worked.

39. In a manner that contradicts the averment in paragraph 3 of his witness statement, the witness stated at paragraph 5 of the statement, thus;

“In any event, there has never been a definitive employment relationship between the Claimant and the Respondent, and at all material times, the Claimant has been an independent contractor being paid for work done, although cumulatively at the end of every month.”

40. An employee like the one described in paragraph 3 of the witness statement can only be someone who is under a contract of service. An independent contractor, as described in paragraph 5, can only operate under a contract for service. In this dispute, it is either that the Respondent was working under a contract of service or a contract for service; it cannot be both.

41. The Appellant stated that the Respondent was a casual worker and explained how his payments would be made at the end of each month. It was their responsibility to prove

this assertion, not the Respondent's. I am not persuaded by any authority suggesting that the duty lay elsewhere.

42. Considering the evidence that was before the learned trial Magistrate in its totality, including the admission by the Appellant's witness's evidence on the period of engagement of the Respondent, and explanation of how the salary was being paid, it makes no sense that the Appellant is using the fact that the bank statements had only two transactions, wanting to give this Court an impression and urging it to conclude, that those were the only payments made between 2010-2019

43. Section 2 of the Employment Act defines a casual worker as;

“a person, the terms of his engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty-four hours at a time.”

44. The descriptions given by the Appellant as brought herein above do not align with the definition of a casual worker as brought out in the provision above mentioned. I am not persuaded, therefore, that the Respondent was a casual

worker. I am convinced that, as asserted and submitted by the Respondent, he was a term employee and entitled to the protections and rights contemplated under the Employment Act.

How did the Separation Occur?

45. The Respondent asserted that the Appellant verbally terminated his job. The Appellant, on its part, contended that the Respondent deserted duty on 31st July 2019. It is trite law that where the employer asserts desertion, they must demonstrate the efforts they made to contact the concerned employee, get to know why he was not on duty without authority, notify him where necessary that his or her continued absence from duty would attract disciplinary action against hi or her, and initiate and undertake disciplinary proceedings against the employee where applicable on account of desertion.
46. Their vision clouded with the position they took that the Respondent was a casual employee, the Appellant didn't lay before the trial Court evidence to establish that they abided by what the law required of them, as brought out hereinabove.

47. In sum, they did not rebut the Respondent's evidence that he was verbally dismissed. In conclusion, therefore, the separation was initiated by the Appellant. The Respondent was verbally dismissed.
48. Having said this, I now turn to consider whether the dismissal was unfair as alleged by the Respondent. For a termination of an employee's employment to be considered fair, it must be demonstrated that it was procedurally and substantively fair. In the case of **Pius Machafu Isundu vs Lavington Security Guards Limited [2017] eKLR**, the Court of Appeal elaborately set out the duty of an employer in a dispute like this, thus;

“There can be no doubt that the Act, which was enacted in 2007, places a heavy legal obligation on employers in matters of summary dismissal for breach of employment contracts and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating [section 43]-prove that the reasons were valid and fair [section 45]-prove that the grounds are justified [section 47[5], among

other provisions. A mandatory and elaborate process is then set up under section 41, requiring notification and hearing before termination.”

49. Did the Appellant discharge the duty? Certainly not. Why. Because they allowed their Judgment to be blurred by their position that the Respondent was a casual employee who was not entitled to the protections under sections 41, 43, 45, and 47[5] of the Employment Act. They didn't, therefore, present evidence before the trial Court to establish the duty.

Was the Respondent entitled to the reliefs granted

50. Under Section 49 (1) (c) of the Employment Act 2007, Courts are granted the authority to award compensatory relief to an employee who has successfully challenged their employer's decision to terminate their employment on the ground that it was unfair. However, it is important to note that the exercise of this power is discretionary and depends on the circumstances of each case. Having found that the Respondent's dismissal was unfair, the trial Magistrate was therefore not in error when she awarded the compensatory relief.

51. However, it bears repeating that when this discretion is exercised, the Court must provide reasons for the manner and extent of its exercise. The learned trial Magistrate considered how the dismissal was carried out, his length of service, and awarded him the maximum compensation permitted under section 49[1]c] of the Act, which is twelve months' gross salary. Given the principle that damages under this section are not intended to punish the employer, and considering the respondent's profession, and noting that it was not alleged he was unable to find another job after dismissal, I hold that justice does not require a maximum award. I therefore reduce it to six months' gross salary.
52. The Appellant challenged the award of notice pay for the Respondent by the learned trial Magistrate. This Court has hereinabove found that the Respondent's employment was indefinite in nature. Therefore, under section 35 of the Employment Act, the same was terminable by twenty-eight days' notice. Undeniably, the notice was not issued. As such, he was entitled to notice pay under section 36 of the Act. The learned trial Magistrate did not err in making the award.
53. The Appellant did not sufficiently contest the

Respondent's claim for compensation for earned but unutilised leave through evidence, as they believed that their assertion that the Respondent was a casual employee would prevail. In the absence of evidence from their side to show that the Respondent was permitted to enjoy his statutory right to annual leave or that he was compensated for the leave days earned but not taken, I find no reason to conclude that the learned trial Magistrate erred in making an award under this head.

The Cross-Appeal

54. I have carefully examined the grounds raised by the Respondent in his Cross-Appeal. They all concern those claims, such as salary underpayment, service pay, compensation for overtime and public holidays worked, and unpaid house allowance, which the learned trial Magistrate failed to award. The Respondent argued that the failure constituted an error in law and fact. In my view, the Cross-Appeal has no merit for the reasons hereunder.
55. Under section 48 of the Labour Institutions Act, an employee would find a cause of action against his employer who, at any material time, but subject to the

limitation of time set out under section 90 of the Employment Act for any cumulative sum, the difference between what he actually earned, and what he ought to have earned had the employer adhered to the relevant Wage orders, where the salary paid was less the minimum wages set out in the Orders.

56. To succeed in such a claim, the pleadings must be thorough. The evidence by the Claimant must clearly point out that the Wage Orders applied to him or her; the pleadings and evidence must show the exact Wage Orders that were applicable, and the extent of underpayments that occurred, at the various times during the period in issue, considering that the minimum wages change from time to time. These are matters that a Court of law would take judicial notice of, as the Respondent's Counsel believes and submits. There was no sufficient evidence that was placed before the learned trial Magistrate from which she would draw a conclusion that the Respondent was underpaid.
57. Counsel should bear in mind that submissions have never served as a substitute for evidence.

58. The Respondent claims that, in error, the learned trial Magistrate failed to award him an unpaid house allowance. I have carefully considered his Memorandum of Claim, and it is clear that compensation for the unpaid house allowance was not one of the reliefs he sought. No court of law could have the authority to grant a relief that was not requested.
59. Besides the reliefs that the learned trial Magistrate declined to award, being mentioned in the reliefs' section of the Respondent's pleadings, no factual basis was laid for them in the body of the pleadings. No evidence was led to establish his entitlement to the reliefs. They were rightly not awarded.
60. In the upshot, the Appellant's appeal succeeds only to the extent that the award for compensation for unfair dismissal is reduced to 5 months' gross salary, KShs. 104,605. The Respondent's Cross-Appeal fails.
61. Each party shall bear its own costs of the Appeal and the Cross-Appeal.

**Read, signed, and delivered virtually in Mombasa on
October 30th 2025.**

OCHARO KEBIRA

JUDGE