

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

ELRC APPEAL NO. E213 OF 2024

ABEDNEGO MUMO MUEMA .....APPELLANT

VERSUS

PORTSIDE FREIGHT TERMINALS .....RESPONDENT

*(Being an Appeal against the judgment of Hon G. Sogomo Principle  
Magistrate, delivered on 13th September 2024 in Mombasa CMCELRC No. 97  
of 2020)*

**JUDGMENT**

**Background**

1. The Appellant sued the Respondent in the above-mentioned lower court suit, seeking the following reliefs;
  - a) A declaration that the Claimant's dismissal from employment was unfair and wrongful.

b) The Respondent be compelled to issue the Claimant a Certificate of Service.

c) Terminal dues amounting to Kshs. 2,636,436.00.

d) Costs and incidental to this suit.

e) Interest in items (c) and (d) above.

2. In his pleadings, the Appellant particularised the above-mentioned cumulative sum as hereunder;

a) One month's salary in lieu of notice ... Kshs. 43,000.00

b) Salary Arrears (20months) .....Kshs.860,000.00

c)House Allowance (11years) ..... Kshs.850,400.00

d)Leave pay (3 years) .....Kshs.96,750.00

e) Gratuity .....Kshs.270,286.00

f) Compensation for unfair termination

(12 months) .....Kshs. 516,000.00

Total.....Kshs. 2,636,436.00

3. The Respondent opposed the Respondent's claim through a Statement of Defence dated 11th May, 2020. The Respondent argued that the termination of the Appellant's employment resulted from the Appellant's absconding from duty after being implicated in payroll irregularities involving former employees. Additionally, the Respondent denied the Appellant's entitlement to the reliefs he had sought.

#### **The Appellant's case before the trial court**

4. The Appellant, Abednego Muema Mumo, stated that he was employed by the Respondent in 2008 as a Security Officer. At all material times, he served the Respondent diligently, with his contract extended and his salary revised over time.
5. In 2015, he was promoted to Human Resource Assistant with a gross salary of Kshs. 43,000 per month.
6. He carried out his duties diligently until February 2017, when a dispute emerged between him and management regarding the payment of terminal dues to employees. Specifically, he

advised the Director, Hamid Salim Sadru, to pay employees their final dues in accordance with the law.

7. On 4th March 2017, he was summoned by the Director and asked to leave the company premises without explanation, a hearing, or issuance of a termination letter. He was denied all dues and had to seek alternative employment.
8. During his employment period, he did not take any annual leave, especially in 2009, 2010, and 2011. Additionally, his salary of Kshs. 43,000 did not include a house allowance. At the time of his departure, the Respondent owed him roughly twenty months' worth of salary arrears.

### **Respondent's case in the lower court**

9. The Respondent, through its witness Suleiman Maulana, denied that the Appellant's employment was unfairly terminated. It also denied the allegation that the Appellant was denied his final dues. It was asserted that the Appellant absconded from work after being implicated in payroll irregularities involving former employees.

10. The Respondent stated that in January and February 2017, some employees had left the company, but the Appellant, as Human Resource Officer, failed to remove them from the payroll system and reportedly colluded with them to continue receiving salaries
11. It was the Respondent's case that, when questioned by Management about this misconduct, the Appellant voluntarily left the premises and never returned, and that the claim he was instructed to leave was false and misleading.
12. The Respondent further argued that at the time of absconding, the Appellant did not hand over employee files, including his own HR file, which remains missing from the company records.
13. The Respondent stated that its employees' salaries are all-inclusive, paid monthly with pay slips issued, and that statutory deductions, including NSSF and NHIF, were

properly and dutifully remitted. They were all entitled to paid annual leave, contrary to the Appellant's claims.

14. The Respondent asserted that the allegations made by the Appellant regarding unpaid salaries, house allowance, or the denial of leave were false and lacked sufficient evidence.

### **Judgment of the trial court**

15. After hearing the parties on their respective cases, and considering their submissions, the trial Court found that the Appellant had proved that the termination of his employment was unfair. Notwithstanding the finding, the trial Court declined to award the Appellant all the reliefs he had sought, save notice pay, one month's salary in lieu of notice

### **The Appeal**

16. Dissatisfied with the judgment of the lower court, the appellant filed the present appeal, setting out the following grounds;

- 1) THAT the Learned Magistrate erred in fact and law in failing to award the Claimant/Appellant his terminal dues or a Certificate of Service despite finding his termination unfair and wrongful.
- 2) THAT the Learned Magistrate misdirected himself in law applying the principle of joinder of issue mutatis mutandis via the Civil Procedure Rules 2010 & despite the provisions and principles of the Employment and Labour Relations Court Procedure Rules & Act.
- 3) THAT the Learned Magistrate misdirected himself in law in shifting the burden of proof of Desertion/Abscondment despite the provisions of Sec 74 of the Employment Act 2007 and the lack of evidence on the record of the Respondent.
- 4) THAT the Learned Magistrate erred in fact and law in finding that the Respondent had discharged its burden of proof in terms of a defence of gross misconduct, abscondment or desertion despite no proof whatsoever and contrary evidence on Record.

- 5) THAT the learned Magistrate misdirected himself on the position in regard to the Respondent's witness and pleadings on Record that were wholly contradictory.
- 6) THAT the Learned Magistrate erred in fact and in law in denying the Claimant/Appellant his terminal dues despite his evidence and testimony being uncontroverted, and the Learned Magistrate's findings thereto are ungrounded on the evidence of either party on Record.
- 7) THAT the Learned Honourable Court misdirected itself in finding the Claimant/Appellant having stolen Records despite untraversed evidence to the contrary on Record and no evidence at all to corroborate the same, and thus struck down the Claimant's cause.
- 8) THAT the Learned Magistrate erred in fact and in law in finding that the Respondent had proven the terms of employment to controvert the Appellant's claim for dues in regard to House Allowance and Gratuity.

9) THAT the Learned Magistrate misdirected himself in fact and law in denying the Appellant the costs and interest of the cause in the trial.

### **Appellant's submissions**

17. The Appellant submitted that the Respondent's defence, as set out in his pleadings, was that he deserted duty. However, deviating from its pleadings, the Respondent's witness testified that the Appellant colluded with other staff to embezzle funds from the payroll, and upon being confronted, he stole his records in the process.

18. The learned trial Magistrate found that the Appellant's termination was unlawful but refused the remedies sought, on the grounds that he did not contest the allegation of theft of records. The trial Court relied on **Raghibir Singh Chatte v National Bank of Kenya [1996] eKLR** to conclude that

the fact was therefore admitted. The Appellant argues that the point was improperly taken by the learned Magistrate, and the reliance on the decision was irrelevant, as the issue was not pleaded to require contesting. However, as the issue was only raised in the Respondent's witness's statement, the Appellant answered to the same in his oral testimony, when he explicitly denied ever being involved in the theft of the record.

19. The Appellant asserts that his claim that he was verbally instructed to keep out of the workplace was not controverted by the Respondent. Though the Respondent asserted that he deserted duty upon disciplinary proceedings being initiated against him, the Respondent did not present any documentary evidence to show the initiation.
20. The learned trial Magistrate erred by relying on an unpleaded and unproven matter to deny the appellant the reliefs he sought, which he would normally be entitled to after proving his case for unfair termination. To buttress this point, reliance was placed on **Ileri v New Kenya Co-**

**operative Creameries Ltd (Cause 113 of 2017) [2023] eKLR and Boniface Nkubi Karagania v Protective Custody Limited [2019] eKLR.**

21. Despite finding the termination unlawful, the trial court denied most of the appellant's claims. The Appellant submits that this was an error.
22. The Appellant submitted his initial employment contract and promotion letter. He contends that the promotion to Human Resource Assistant established a new role, which necessitated a new job description and an adjusted salary. It is apparent that the Respondent unilaterally changed the terms of employment of the Appellant.
23. He further contends that, contrary to the Respondent's claim, his salary did not include house allowance. The Respondent, asserting that it was included, had the legal obligation under section 10(7) of the Employment Act to prove this claim. However, it failed to provide any evidence

to substantiate the assertion. His evidence remains unchallenged.

24. The Respondent did not produce any leave records as required under Section 28 of the Employment Act. The Appellant argues that the trial court's conclusion that he must have taken leave was not supported by evidence and was contradicted by the respondent's own pleadings acknowledging outstanding leave days.

25. The Appellant asserts that the refusal to issue a certificate of service contravened the mandatory requirement under section 51 of the Employment Act.

26. He also contends that costs should have been awarded after the event since the court had already deemed the termination unlawful.

### **Respondent's Submissions**

27. The Respondent submits that the Appellant did not sufficiently and to the requisite standard prove his assertion that he was dismissed from employment by the Respondent.

This is apparent, considering the fact that he could not tell who exactly dismissed him from employment. He gave contradictory names in his evidence. At one point he asserted that it was Hussein Hamid while at another he asserted that it was Hamid Salim Sandru.

28. In his evidence the Appellant admitted that a conflict arose between him and the Respondent, concerning payments for employees who had left the employment of the latter. That the incident led to the loss of his employment. This fortified the Respondent's witness's evidence that the Appellant was guilty of gross misconduct because he colluded with former employees of the Respondent, and facilitated their continued drawing of salary notwithstanding that they were no longer employees. Whereas the Respondent had a valid reason to terminate the Appellant's employment, the Appellant left employment out of his own volition.

29. Having deserted duty, it was not possible for the Respondent to serve the Appellant with a notice to show cause. The

Respondent further asserts that the Appellant left with his employee file, which contained employment records and contact details, and that the file has remained missing since his departure. The Respondent could not get his contact records.

30. The Respondent submits that the Appellant is not entitled to notice pay because he was not terminated. Instead, he voluntarily absconded from duty and left employment without notice.

31. The Appellant's claim for salary arrears spanning 20 months is contested. The Respondent contends that the Appellant's final pay slip for February 2017 indicates he received payment up to his departure date and that he cannot claim salary for a period during which he was not employed.

32. The Respondent asserts that the Appellant's employment contract dated 1<sup>st</sup> July 2010 stipulates an all-inclusive salary, which encompasses the house allowance. Furthermore, it contends that subsequent documents, including the

extension letter dated 1<sup>st</sup> December 2010 and the promotion letter dated 1 October 2015, were issued under the same contractual terms and did not modify the salary framework.

33. The Respondent asserts that gratuity is not a statutory entitlement but rather a discretionary or contractual benefit. Given that the Appellant's contract did not stipulate gratuity and no practice or agreement was demonstrated, the Appellant would not be entitled to such a benefit. The Respondent relies on **Bamburi Cement Limited v William Kilonzi [2016] eKLR** and **Bamburi Cement Ltd v Farid Aboud Mohammed [2016] eKLR** to support the position.
34. The Respondent contends that the Appellant's claim for leave for the years 2009, 2010, and 2011 was flawed. Firstly, the Appellant commenced employment only on 1st July 2010 and therefore cannot claim leave for 2009. Secondly, the claim is barred by time under section 90 of the Employment Act because it pertains to events more than three years prior to the filing of the suit in February 2020.

35. The Respondent asserts that the Appellant is not entitled to compensation because he was not dismissed; instead, he absconded from duty after committing gross misconduct. It contends that the Appellant should not benefit from his own wrongdoing and cites **Matsesho v Newton (Cause 9 of 2019) [2022] KEELRC 1554 (KLR)**, where the court limited compensation due to the employee's misconduct.

### **Analysis and Determination**

36. As a first appellate court, this Court is obligated to reconsider and re-evaluate the evidence on record and draw its own conclusions while bearing in mind that it neither saw nor heard the witnesses testify. See **Selle & Another vs Associated Motor Boat Co. Ltd & Others [1968] EA 123**.

37. I have carefully considered the trial Court's judgment, the record, and submissions by counsel for the parties in this appeal, and three key matters emerge. First, in the judgment, the learned trial Magistrate found that the

Appellant's employment was unfairly terminated by the Respondent. Second, the Respondent did not challenge this finding in a cross-appeal. Third, the submissions acknowledge that the finding was made.

38. There being no appeal against the finding, there would be no reasonable reason for this Court to examine the validity or otherwise of the trial court's finding on that aspect of the claim. However, I must note that the parties invested considerable effort in making extensive submissions on the matter. Efforts which I say were unnecessarily spent given the circumstances.

39. In light of the foregoing, I take a clear view that this appeal turns on only one central issue, whether the learned trial Magistrate was justified in law in awarding the Appellant the remedy of notice pay only, in the circumstances of the matter before him.

40. The Appellant contended that the learned trial Magistrate having found that the termination of his employment was

unfair, the learned trial Magistrate erred in law when he declined to grant him the compensatory relief contemplated under section 49[1][c] of the Employment Act, for unfair termination. That the decision not to award him the relief was based on a matter that was not pleaded, and that therefore needed not to be controverted by way of pleadings.

41. Section 49[1][c] of the Employment Act grants the courts the authority to award an employee who has successfully challenged his/her employer's decision to unfairly dismiss him/her. Nevertheless, it is important to emphasise that the exercise of this power is discretionary, subject to the circumstances of each case.
42. Therefore, in an appeal such as this one, where the trial Court's decision regarding the relief specified in the aforementioned section is challenged, the decision can only be disturbed if it is shown that the trial Court considered irrelevant matters, failed to consider relevant ones, or applied an incorrect legal principle, leading to an erroneous

decision. The Appellant argues that the learned trial magistrate's decision to deny him the compensatory relief was based on a matter that was not pleaded.

43. The learned trial Magistrate held;

***“The claim by the Claimant falls squarely within what is contemplated under section 49 of the Act. However, the court has had regard to the raft of considerations in the award of the claim under this heading as set out in the case of Ol Pajeta Ranching Ltd v David Wanjau Muhoro [2017] eKLR, including whether the Claimant's actions contributed to his termination.***

***In this case, the uncontested act of the Claimant purloining his file from the Respondent when deserting employment casts him in a negative light, and the court shall not permit him to reap a dividend out of his own mischief.***

***No consideration is given to the Claimant under this heading.”***

44. This Court notes the trial Court's further holding that;

***“However, in the instant case, it was pleaded by the Respondents that the Claimant stole his own personal file when deserting employment, and this aspect was never joined with and denied by him, meaning that it is deemed to have been admitted. This position was settled in the case of Raghbir Singh Chatte vs National Bank of Kenya [1996] eKLR.”***

45. I have carefully considered the Respondent's pleadings; undoubtedly, it was not alleged that the Appellant committed the illegal act of stealing his personal file from the Respondent's offices. The Appellant could not, therefore, controvert an unpleaded matter. The trial Court's holding, which formed the basis on which the Appellant was denied relief, was therefore wrongly and irrelevant. The decision cited by the trial Court was too irrelevant in the circumstances of the case. I find no difficulty, therefore, in

concluding that the decision by the learned trial Magistrate can safely be upset, and I do so as hereunder.

46. I have carefully considered the circumstances under which the separation occurred. The length of service by the Respondent, the fact that it was unproven that the termination of his employment was authored by himself, and that the Respondent didn't adhere to the dictates of procedural fairness as was required of him by the law, and come to the conclusion that the Appellant was entitled to the compensatory relief. Consequently, I hereby set aside the learned trial Magistrate's holding that he was not entitled, and in place thereof award him five months' gross salary for unfair termination.

47. I hold that the Appellant was not entitled to the relief of compensation for earned but unutilized leave days, but not on the erroneous basis adopted by the learned trial Magistrate. A claim that an employer continuously failed to allow an employee the enjoyment of the right to his annual

leave, and failed to compensate him in lieu thereof, constitutes a continuous injury. **Section 89 of the Employment Act** provides that claims based on a continuing injury be filed within 12 months from the date the injury ceased.

48. The **Court of Appeal in G4S Security Services (K) Limited v Joseph Kamau & 468 [2018] KECA 827 (KLR)** stated;

*“Regarding ‘a continuing injury’, the proviso to Section 90 of the Employment Act requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve-month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant’s dismissal, any claim based on a continuing injury*

***ought to have been filed within one year, failing which it was time-barred.”***

49. The Appellant sought compensation for leave days earned but not utilised in 2009, 2010, and 2011. This suggests that the injury ceased at the end of 2011 and, by virtue of the provisions of the above-mentioned section of the law, the claim for compensation should have been lodged by the end of 2012. This was not done. The claim before the lower court was that the compensation was time-barred.

50. This Court notes that under the Appellant’s contract, the salary provided under paragraph two of the letter of appointment was gross salary. That being the case, I have no reason to hold that it was not inclusive of house allowance. The learned Magistrate did not err when he declined to award the relief under the head “unpaid house allowance.”

51. The Appellant is entitled to a certificate of service as per section 51 of the Employment Act.

52. The Appellant did not present any legal justification or sufficient documentary evidence to support his claim for salary arrears for twenty months. In my view, the claim was simply thrown to the trial court. The Court rightly rejected the same.

53. Regarding gratuity, it is not a statutory right. It is only available to an employee if it is specified in the contract or a collective agreement. The Court of Appeal in **Bamburi Cement Limited v William Kilonzi [2016] eKLR** confirmed that gratuity is payable only when explicitly stated in the employment contract or established practice, by stating;

***“Turning to the award of gratuity, the first thing that we must emphasise is that gratuity, as the name implies, is a gratuitous payment for services rendered. It is paid to an employee or his estate by an employer either at the end of a***

***contract or upon resignation or retirement or upon death of the employee, as a lump sum amount at the discretion of an employer. The employee does not contribute any sum or portion of his salary towards the payment of gratuity. An employer may consider the option of gratuity in lieu of a pension scheme. Being a gratuitous payment, the contract of employment may provide that the employer shall not pay gratuity if the termination of employment is through dismissal arising from gross or other misconduct. But where, like here, the dismissal is not justified and is wrongful, the employee will be awarded gratuity if it is provided for in the contract of employment.”***

54. The Appellant did not demonstrate that his contract included provisions for gratuity, and the trial court accordingly exercised its proper discretion in dismissing the claim.

55. In the upshot, the Appellant's appeal hereby succeeds in the following terms;

- I. The Appellant is hereby awarded five months' gross salary, KShs. 215,000, as compensation for unfair termination of his employment, pursuant to the provisions of section 49[1][c] of the Employment Act.
- II. The costs of the lower court suit shall be for the Appellant.
- III. As the appeal herein partially succeeds, each party shall bear its own costs of this appeal.
- IV. Interest on the awarded sum in [I] above shall be at court rates from the date of this judgment till full payment.

**Read Signed and Delivered this 12<sup>th</sup> Day of March 2026.**

**OCHARO KEBIRA**

**JUDGE**