



**Central Furniture Shop Limited v Mohamed (Appeal E097 of 2023)  
[2025] KEELRC 199 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 199 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E097 OF 2023  
M MBARÚ, J  
JANUARY 30, 2025**

**BETWEEN**

**CENTRAL FURNITURE SHOP LIMITED ..... APPELLANT**

**AND**

**ALFANI MOHAMED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. J. B. Kalo delivered  
on 29 August 2023 in Mombasa CMELRC No.256 of 2020)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 29 August 2023 in Mombasa CMELRC No.256 of 2020. The appellant is seeking that the judgment be set aside and the claim dismissed with costs.
2. The background to the appeal is a claim filed by the respondent. He claimed that he was employed as a driver by the appellant on 11 February 2017. He was designated as the heavy commercial truck driver at a wage of Ksh.30, 000 per month. On 23 May 2020, the respondent reported to work but his employment was verbally terminated and ordered off the premises. He claimed that there was no warning, notice, disciplinary hearing or any matter to justify the summary action of terminating employment. He claimed that during employment, there were underpayments of wages by Ksh.5, 222.56 per month based on his grade and gazette minimum wages. His NSSF and NHIF were not paid. He did not take off/rest days as provided under the law or allowed to take annual leave. During public holidays, he was at work. Instead of working for 8 hours each day, he remained at work from 7 am to 10 pm each day. The wage paid was not inclusive of a house allowance or provided with housing. He claimed the following:
  - a. A declaration that termination of employment was unlawful;
  - b. Underpayments Ksh.203,679.84;



- c. 12 months compensation for unfair termination Ksh.422,670.72;
  - d. Notice pay Ksh.35,222.56;
  - e. Service pay Ksh.52,833.84;
  - f. Unpaid leave Ksh.73,967.04;
  - g. Overtime Ksh.1,682,750.16;
  - h. House allowance Ksh.206,051.98;
  - i. Certificate of service;
  - j. Costs of the suit.
3. In response, the appellant admitted the respondent was an employee, but no termination of employment was alleged. He absented himself from employment without permission for 108 days, as recorded on the Master Roll. The respondent was a heavy commercial driver who worked from February 2017 to 17 May 2020, when he abandoned the motor vehicle KAW 680J at Jomvu Shell petrol station, left the keys, and left. During employment, the respondent feigned sickness failed to produce medical evidence and disappeared without a trace in November 2019.
  4. On the claims made, the appellant's case is that the wages paid were gross, including the house allowance. He was not diligent in his duties and remained rude and stubborn. He was issued warnings, and through a letter dated 29 July 2019, he apologized for engaging in altercations with the employer as he planned to leave. After the respondent abandoned the motor vehicle KAW 680J, he called his supervisor and demanded his wages for April 2020, which he was paid, and he never resumed duty. The respondent left the motor vehicle KAW 680J loaded with wheat destined for haulage and delivery to Uganda. Abandonment of duty is gross misconduct sufficient for summary dismissal, but the appellant did not issue such sanction. Upon abandoning his vehicle on 18 May 2020, the respondent only returned on 2 June 2020 with a demand letter from *Kenya Long Distance Truck Drivers & Allied Workers Union*, which claimed unfair termination of employment.
  5. The respondent told the appellant that he was unwell after failing to attend to his duties from 18 to 22 May 2020. He promised to proceed to Uganda as assigned but failed because he was taking a COVID test. He was summoned to the office but failed to attend. Instead, he sent a message that he had terminated his employment. The appellant did not terminate the respondent's employment as alleged to warrant a disciplinary hearing. He was paid Ksh.35, 250 in notice pay, including house allowance. The nature of work does not allow overtime work. The respondent had rest/off days for 7 days. Statutory deductions were made to NSSF and NHIF. The respondent took all his annual leave days;
    - a. 21 days in December 2018 to January 2019;
    - b. 7 days in May 2019;
    - c. 14 days in December 2019 to January 2020;
    - d. 10 days in March 2020.
  6. The wage paid was consolidated inclusive of house allowance. The claims made should be dismissed.



7. The learned magistrate in the judgment delivered on 29 august 2023 held that the respondent did not voluntarily leave his employment and there was unfair termination of employment for lack of due process.
8. On the claims made, the learned magistrate assessed the as follows;
  - a. underpayments over the years and awarded Ksh.203,679.94;
  - b. 8 months for unfair termination of employment;
  - c. Notice pay Ksh.35,222.56;
  - d. Accrued leave days Ksh.49,311.36;
  - e. House allowance Ksh.190,201.68;
  - f. Costs of the suit.
9. The claims for public holidays and overtime were declined for lack of proof.
10. Aggrieved, the appellant filed the appeal on four (4) grounds;
  1. The learned magistrate misdirected himself on the facts and erred in assessing the documented facts of the case and thereby reached a wrong decision that was oppressive and contrary to the employment law.
  2. The learned magistrate failed to apply his mind to the clear facts pleaded and placed before him when he introduced his own theory on how the respondent absconded duty and imposed his own explanation of the conversation through WhatsApp hence the wrong finding and decision.
  3. The learned magistrate erred when he delved into semantics to attribute different meanings of the words 'voluntary' and 'absconded' by constructing them independently whereas the first is a state of mind and the second is the action and thereby a wrong decision contrary to the law.
  4. The learned magistrate reached a wrong decision that is beneficial to a tortfeasor in employment law.
11. Both parties attended and agreed to address the appeal by way of written submissions.
12. The appellant submitted that the trial court failed to assess the entire record and held that there was no voluntary abscondment of duty. He failed to appreciate that the respondent resigned from his employment. In the case of Kenfreight (E.A) Limited v Benson K. Nguti [2019] eKLR the court held that there is a need to evaluate the employment record in disputes relating to alleged wrongful termination of employment. Had the trial court considered the totality of the evidence, it would have emerged that the respondent abandoned his employment. The appellant had no obligations to him as held in Co-operative Bank of Kenya Ltd v BIFU (Kenya) [2017] eKLR.
13. The trial court erred in interpreting the terms 'voluntary' and 'absconded'. The court assigned its theories over these terms, leading to an error instead of interpreting employment terms as held in David Gichana Omuya v Mombasa Maize Millers Ltd [2014] eKLR. The judgment resulted in a decision beneficial to a tortfeasor in employment, which undermines employment law.
14. The appeal is that the judgment should be reviewed and set aside with costs.



15. The respondent submitted that the employment relationship is not contested. He was employed as a heavy commercial driver at a wage of Ksh.30 000 per month instead of Ksh.35 222 per month. On 23 May 2020, the respondent was verbally dismissed from his employment and sent out of the premises without any termination letter or payment of his terminal dues. No notice was issued.
16. The trial court assessed the facts and arrived at a correct judgment. Where the respondent is alleged to have committed gross misconduct, recourse was a disciplinary hearing and the due process as held in Prof. Macha Isunde v Lavington Security Guards Limited [2017] eKLR. The appellant has alleged there was absconding of duty without any evidence. Under Section 41 of the *Employment Act*, due process required the issuance of notice and a hearing for the respondent to make his representations as held in *Kenya Ports Authority v Munyao & 4 others Petition E008 of 2023*.
17. The respondent submitted that the award of notice pay, unpaid leave, public holidays, and overtime are justified together with costs.

### **Determination**

18. This is a first appeal. The court has a duty to reassess, review, and go through the entire record and make its conclusions. However, the trial court had the chance to hear the witnesses testify in court and ask questions.
19. The respondent's case before the trial court was that on 23 May 2020, his supervisor verbally terminated his employment and directed him out of the premises. He was not paid his terminal dues and hence made his claims.
20. The appellant, on their part, claimed that the respondent worked until 17 May 2020, when he abandoned the motor vehicle KAW 680J at Jomvu Shell Petrol Station, left the keys, and went away. He did not resume his duties for 108 days, but he wrote through WhatsApp and feigned sickness. He left without a trace until November 2019, when he demanded to be paid his wages.
21. Indeed, as the trial court held, an employer who claims that the employee has abandoned his employment has the burden of proof. An employee does not terminate his employment in the event of allegedly abandoning duty. The employer has the legal burden of addressing the lapse.
22. It is not sufficient for the employer to plead abandonment of duty by the employee as evidence of termination of the contract. The employer must demonstrate that reasonable steps were taken to find out the employee's whereabouts and require him to resume duty to no avail. The employer must, where possible, demonstrate that they addressed the matter of the employee's unexplained absenteeism through the available internal disciplinary channels as held in the case of Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] KEELRC 141 (KLR). Desertion, being a unilateral act of abandonment of the contract, cannot operate to bring a contract of service to a close until the employer acts on it, as held in Kitumu v Simba Apparel Epz Limited [2023] KEELRC 1666 (KLR).
23. In this case, the assertion by the appellant that the respondent was not noted on the Master Roll for the period absent from work is not sufficient. This is not envisaged under Sections 41 and 44 of the *Employment Act*. Absence from work is gross misconduct, and the employer must notify the employee to attend and address. Where the employee remains absent or fails to respond to the notice issued, the employer has the legal duty to issue a notice terminating employment. Where the employee cannot be traced through the known address, recourse is to submit the notice terminating employment to the Labour Office under the provisions of Section 18(5) of the *Employment Act*.



24. In this regard, the learned magistrate assessed the evidence well, and the findings cannot be attributed to fault.
25. On the claims made, notice pay and compensation are due when the employer terminates employment without adhering to the law. By leaving the respondent at large over alleged abandonment of duty without the notice to attend and address or issuance of notice terminating employment, the assessed compensation is given a justification and notice pay is adequately addressed.
26. On the claim for underpayments, under Section 18(4) of the *Employment Act*, whatever the reasons that lead to termination of employment, for work done, the employee must be paid his lawful dues;
  - (4) Where an employee is summarily dismissed for lawful cause, the Employee shall, on dismissal, be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
27. This is reiterated in the case of *Ronald Odeke v Fidelity Security Limited Cause No.1998 of 2011*, which states that it does not matter what offence the employee is accused of. Where the employee is not given a hearing, termination of employment is unfair, and he is entitled to notice pay and compensation.
28. In this case, the trial court assessed the due underpayments based on the fact that the respondent was a heavy commercial driver. The due wage under the Wage Orders was Ksh.35, 222, but the appellant paid Ksh. 30,000 each month.
29. Employment terminated on 23 May 2020. The applicable Wage Orders provided a monthly minimum wage of Ksh.30, 628.45. This was the wage applicable from 1 May 2017 to 23 May 2020, when employment terminated.
30. The due wage, including a 15 percent house allowance, amounts to Ksh.4, 594.20, and the gross salary is Ksh.35, 222.
31. The award of Ksh.203, 679.84 in underpayments is well-addressed and justified. This includes the due house allowance.
32. The assessed leave pay was well addressed and justified, and the trial court's findings cannot be faulted.
33. The award of house allowance separately, despite this being incorporated under the underpayments, is in error.
34. On the overtime claim, the respondent generalized that he worked from 7 a.m. to 10 p.m. for 7 days. The trial court analyzed that the respondent took 21 leave days in 2019. It cannot be humanly possible that, as a heavy commercial driver, he would report on duty at 7 a.m. and stop at 10 p.m. This is exaggerated, and hence, it was declined.
35. On the claim for service pay, the appellant submitted registration records with NSSF and NHIF. Having complied thus, the same is not due.
36. These must be specified on the claim for work during public holidays, which is not the case hereby.
37. Save for the double allocation of house allowance and the underpayment of wages, the appeal is allowed this far. The trial court's costs shall be as awarded as the claim was successful. Each party bears its costs for the appeal.
38. Accordingly, the judgment of the trial court in Mombasa CMELRC No.256 of 2020 is reviewed with the following awards;
  - a. A declaration that termination of employment was unlawful;



- a. underpayments Ksh.203,679.94;
- b. 8 months compensation Ksh.281,780;
- c. Notice pay Ksh.35,222.56;
- d. Accrued leave days Ksh.49,311.36;
- e. Costs of the trial court as awarded and each party is to bear its costs for the appeal.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 30 DAY OF JANUARY 2025.**

**M. MBARŪ**

**JUDGE**

