



REPUBLIC OF KENYA



**KENYA LAW**  
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**Kisero v Wabwire (Appeal E190 of 2024)  
[2025] KEELRC 176 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 176 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E190 OF 2024  
M MBARÚ, J  
JANUARY 30, 2025**

**BETWEEN**

**BILDAD KISERO ..... APPELLANT**

**AND**

**JOSEPH JUMA WABWIRE ..... RESPONDENT**

*(Being an appeal from the judgment on Hon. G. Sogomo delivered  
on 16 August 2024 in Mombasa CMELRC E076 of 2023)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 16 August 2024 in Mombasa CMELRC No.E076 of 2023. The appeal is on four (4) grounds that;
  1. The learned magistrate erred in law and fact by failing to determine whether a termination of employment had in fact been proved.
  2. The learned magistrate injudiciously exercised his discretion by awarding manifestly high compensation in the circumstances.
  3. The learned magistrate erred in law and fact in awarding underpayment of salary for the years 2018, 2019, 2020 and 2021 despite Section 90 of the *Employment Act*.
  4. The learned magistrate erred in fact in awarding leave pay for 2 years, yet the respondent had admittedly been on leave.
2. The appeal is premised on facts that in November 2009, the appellant employed the respondent as a night security guard at the private residence in Mbaraki, earning Ksh.10, 000 per month, which was later increased to Ksh.15, 000 per month. On 2 September 2021, the respondent asked for permission to attend his grandmother's burial, and it was agreed that he should take one month's leave from 5 September 2021. He claimed that he contracted an illness while at home and could not resume



- duty, so the appellant indulged him. On 10 October 2021, the appellant called and terminated his employment without notice or justification. The respondent claimed there was an unfair termination of employment. He claimed the following;
- a. Notice pay of Ksh.15,141.95;
  - b. Underpayments from October 2018 to December 2019 Ksh.77,129.25;  
Underpayments from January 2020 to September 2021 Ksh.2, 980.95;
  - c. Leave pay for 2 years Ksh.21,198.73;
  - d. House allowance October 2018 to October 2021 Ksh.81,766.53;
  - e. Service pay for 3 years ksh.22,712,93;
  - f. 12 months compensation Ksh.181,703.40;
  - g. Costs of the suit.
3. In response, the appellant admitted employment and that the wage paid included house allowance. The respondent was allowed leave but in early 2022 he called and indicated that he was ill without any evidence. He then reported a complaint to the labour office. There was no termination of employment as alleged. The claims for underpayments are time-barred and annual leave was allocated and taken. The claims made should be dismissed.
4. The trial court heard the parties and delivered judgment and held that there was unfair termination of employment and the following awards issued;
- a. Notice pay ksh.15,141.95;
  - b. Underpayments  
October 2018 to December 2019 Ksh.77, 129.25;  
January 2020 to September 2021 Ksh.2, 980.95;
  - c. Unpaid leave Ksh.21,198.73;
  - d. Unpaid house allowance nil;
  - e. Service pay Ksh.22,712.93;
  - f. 12 months compensation Ksh.181, 703.40.
5. On the appeal, both parties agreed and filed written submissions.
6. The appellant submitted that the trial court failed to determine whether there was a case of unfair termination of employment. Under Section 47(5) of the *Employment Act*, the employee who alleges unfair termination of employment has the burden of proof. The respondent was allowed annual leave and did not resume duty. He called and alleged that he was taken ill without evidence. He abandoned his employment without cause. The learned magistrate failed to address these facts with a conclusion.
7. The appellant submitted that the award of compensation, if due, and service pay and notice pay is manifestly high without justification, as held in *Kiambaa Dairy Famers Co-operative Society Limited v Rhoda Njeri & 3 others* [2018] eKLR.
8. The award of alleged underpayments from 2018 to 2021 is time-barred under Section 90 of the *Employment Act* as held in *Mary Kitsao Ngowa & 36 others v Krystalline Limited* [2015] eKLR. The



respondent had until 9 October 2022 to urge his claims for alleged underpayments, but he filed suit on 16 February 2023.

9. The leave award is without merit since there is an admission of taking annual leave. The appeal should be allowed as prayed.
10. The respondent submitted that he worked for the appellant for 11 years. He was allowed to attend his grandmother's burial while on leave from 5 September 2021 but fell ill and could not attend work. On 2 October 2021, he called the appellant without response. On 5 October 2021, when his leave ended, he returned to work and was denied access. On 10 October 2021, the appellant informed him that he had been replaced and his employment terminated. The trial court assessed the facts well and held that there was unfair termination of employment. The findings that unlawful termination of employment is correct, and the appeal should be dismissed with costs.
11. In the case of *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR, the court held that where the employee has established a prima facie case under Section 47(5) of the *Employment Act*, the employer bears the burden of proving the reasons leading to termination of employment. In this case, the appellant failed to discharge its burden. Where the appellant alleged the respondent failed to attend work after going on leave, there was no due process under Section 41 of the *Employment Act* as held in *Godfrey Anjere v Unique Suppliers Limited* [2015] eKLR.
12. The respondent submitted that the awards of compensation and notice pay were justified. Leave is due under Section 28 of the *Employment Act*, and the appellant failed to submit proof that the respondent was allowed to take annual leave.
13. There were underpayments contrary to the applicable Wage Orders, 2018. The minimum wage was Ksh.15 141.95 per month, but the respondent was paid Ksh. 10,000 which increased to Ksh.15 000; hence, the claim for underpayments is justified as pleaded.
14. Service pay is due under the provisions for 11 years at Ksh.83, 280.73, and the claimed amount of Ksh.22 712.93 should be reviewed at the discretion of the court. The learned magistrate erred by applying Article 159(2) (d) of the *Constitution* because the claim only accrued for 3 years. The appeal should be dismissed with costs.

### **Determination**

15. This is a first appeal, and the primary role of the court is to re-evaluate, re-assess and re-analyze the record and then determine whether the conclusions reached by the trial court are to stand or not and give reasons either way as held in the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2 EA 212 wherein the Court of Appeal held inter alia that:-

... the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.
16. The appellant maintains that the respondent was allowed annual leave on 5 September 2021 but failed to resume work. He called and indicated that he had fallen ill without evidence and subsequently abandoned his employment.
17. The respondent, on his part, admits that he was allowed compassionate leave upon the demise of his grandmother. He fell sick, and when he called the appellant, he received no response. When he reported



on 10 October 2021, he found he had been replaced and was denied access to the appellant's private residence.

18. The respondent's admission that he was allowed leave by the appellant meant that he was absent from work with permission from the employer. That is permissible under Section 44(4) (a) of the *Employment Act*. Absence from work must be with permission from the employer.
19. The respondent testified that upon taking leave on 5 September 2021, he called the appellant on 2 October 2021 while within his leave period, but there was no response. He reported at the premises on 5 October 2021, when his leave ended, but was denied access.
20. The appellant asserted that the respondent failed to report back to work. Where annual leave was adequately granted, the appellant had to notify the respondent when he failed to resume work. The allegations that he called, indicating that he was sick but failed to produce evidence were not regularized. An employee does not terminate his employment as held in *Kensalt Limited v Mwaruwa* [2024] KEELRC 1367 (KLR) that;

The employee does not terminate his employment through absenteeism or abandonment of work. The employer must remain proactive and secure itself through the law. Absenteeism and absconding duty are acts of gross misconduct that the employer must address.

21. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer must issue notice terminating employment or summary dismissal through the employer's last known address. See *Owudu v Digital Sanitation Services Limited* [2024] KEELRC 917 (KLR).
22. In this regard, the appellant was alleged to be unwell and, hence, could not report to work as required. The duty to address such a lapse rested on the employer. The failure to bring closure to the employment relationship resulted in the current claim.
23. The finding that there was unfair termination of employment that failed the provisions of Sections 41, 43, and 45 of the *Employment Act* is correct.
23. The respondent is entitled to notice pay and compensation.
24. The last wage due to a night security guard in Mombasa in the year 2021 was Ksh.15, 141.95 plus a 15% house allowance of Ksh.2, 271.25 gross Ksh.17, 141.25
25. Regarding compensation, the matter leading to the termination of employment was the respondent's absence from work due to an alleged illness. He did not produce any medical report on his allegations. Under the provisions of Section 45(5) (2) of the *Employment Act*, the court must consider the employee's conduct before the termination of his employment. It should be noted that for the 11 years of service, no other record was filed by the appellant. These matters put into account, the court finds compensation at 3 months gross wage appropriate at  $Ksh.17,141,25 \times 3 = Ksh.52,239.75$
26. On the claims for underpayments and house allowances from October 2018 to September 2021, indeed, as submitted by the appellant, underpayments, if due, accrue monthly. These should be addressed under Section 89 (previously Section 90) of the *Employment Act*. Continuing injuries as defined under the Act is limited to 12 months from the date of cessation as held in *G4S Security Services*



(K) Limited v Joseph Kamau & 468 others [2018] KECA 827 (KLR) and Kenya Railways Corporation v Ododa & 216 others [2024] KECA 1620 (KLR) that;

The law provides that the time limit for filing claims of continuing injury or damage should be within 12 months after the cessation of the continuing wrong. Therefore, we interpret the provision to mean that regardless of the three-year period lapse for the institution of employment disputes, if an employer continues to breach a term of the agreement agreed between the employer and employee, the employer remains liable until the breach is purged.

As long as the continuing injury persists, it creates a distinct and separate cause of action. The time limit set to file claims arising out of 'continuing injury' is 12 months after the cessation. In the appeal before us, the appellant did not tell us when cessation happened to enable us to compute time. ...

27. The appellant is correct in the submissions that employment terminated in October 2021, and the respondent filed the claim on 16 February 2023. Based on the principles set out above by the Court of Appeal and Section 89 of the *Employment Act*, the continuing injury of underpayments should have been addressed within 12 months of the date of cessation. From October 2021, the respondent had until September 2022 to address these claims.
28. Time-barred claims denied the trial court jurisdiction to hear and make an award.
29. On the leave pay claims, the respondent admitted that his employment was terminated while he had taken annual leave. To claim pay in lieu of taking leave is without merit. Even in a case where he had not taken annual leave for the 11 years of service, section 28(4) of the *Employment Act* caps accrued leave to 18 months only. On this basis, the award in leave pay is not justified.
30. The claim for service pay is due under the provisions of Section 35(5) and (6) of the *Employment Act*, where the employer fails to pay statutory dues. The appellant submitted no evidence of compliance. Service pay is claimed at Ksh.22, 712.93 even though the respondent worked for 11 years.
31. In the written submissions, the respondent has urged the court to use its discretion and enhance such payment to Ksh.83, 280.73 from Ksh.22, 712.93 that was pleaded. However, a party cannot amend pleadings upon appeal and in the written submission. Parties are bound by their pleadings as held in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] KECA 225 (KLR) that;  

... In any event, the issue was neither raised in pleadings nor made part of the prayers in the claim. Needless to say, parties are bound by their pleadings. In our view, the first broad ground of appeal relating to the documents required to be kept by an employer is unnecessary, and we give it a wide berth. ...
32. In the case of Postal Corporation of Kenya v Andrew K. Tanui [2019] KECA 489 (KLR), the Court of Appeal held that;  

... But from the beginning, when filing its defence in January 2010, the appellant admitted paragraph 3 of the claim. Needless to say, parties are bound by their pleadings. It would, therefore, be idle to raise the issue at this stage when, in reality, it was always a non-issue. ...
33. The award of Ksh.22, 712.93 in service pay shall suffice.
34. On costs, the respondent's claim before the trial court had a good foundation. His employment was unfairly terminated, so he was entitled to costs. As analyzed above, the appeal has clarified various aspects of the trial court judgement, and each party should bear its costs.



35. Accordingly, the judgment in Mombasa CMELRC No.E076 of 2023 is hereby reviewed in the following terms;

1. Compensation Ksh.52, 239.75;
2. Notice pay Ksh.17, 141.25;
3. Service pay Ksh.22, 712.93;
4. Costs of the trial court proceedings;
5. For the appeal, each party is to bear its costs.

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

**M. MBARŪ**

**JUDGE**

