



REPUBLIC OF KENYA



KENYA LAW
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**Kentonda Company Limited v Wafula (Appeal E055 of 2024)
[2025] KEELRC 48 (KLR) (23 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 48 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E055 OF 2024
M MBARÚ, J
JANUARY 23, 2025**

BETWEEN

KENTONDA COMPANY LIMITED APPELLANT

AND

ERIC WAFULA RESPONDENT

*(Being appeal from the judgment of D.O. Mbeja delivered
on 29 February 2024 in Mombasa CMELRC E029 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 29 February 2024 in Mombasa CMELRC Cause No.E029 of 2022. The appellant seeks to set the judgment aside with costs and dismiss the respondent's claim.
2. Before the trial court, the respondent claimed that he was employed as a general labourer by the appellant on 5 May 2020 at a wage of Ksh.15, 000 per month. He worked until 5 November 2021, when the appellant terminated his employment unfairly for lack of notice, reasons or payment of terminal dues. He claimed the following;
 - a. Notice pay Ksh.15,000;
 - b. House allowance for 18 months Ksh.40,500;
 - c. Unpaid leave for 1 year Ksh.13,715.10;
 - d. 12 months compensation Ksh.180,000;
 - e. Unpaid overtime of 1 hour for 18 months Ksh.65,502;
 - f. Unpaid NHIF for 18 months Ksh.9,000;



- g. Service pay for a year Ksh,7,500;
 - h. Costs of the suit.
3. In response, the appellant made mere denials. Denied there was an unfair termination of employment as alleged and that the respondent absconded duty. The respondent would be engaged at the gate when work was available and would be picked randomly and paid for work done at the end of the day. There was no employer-employee relationship between the parties or on a fixed-term contract. The alleged wage of Ksh.15, 000 is not correct and the claims made should be dismissed.
 4. The trial court heard the parties and delivered judgment on 29 February 2024 and held that there was unfair, unlawful and wrongful termination of employment and that the respondent is entitled to reliefs sought in the Memorandum of Claim with costs plus interest from the date of filing suit.
 5. Aggrieved, the appellant filed the appeal on four (4) grounds;
 1. That the trial court erred in law and fact in finding that the claimant [respondent] and the respondent [appellant] shared an employer-employee relationship.
 2. The trial court erred in law and fact in failing to find that the respondent engaged the claimant based on the availability of work.
 3. The trial court erred in law and fact in finding that the claimant was wrongfully, unfairly and unlawfully terminated from employment by the respondent.
 4. The trial court erred in law and fact by arriving at a decision that was not supported by the evidence on record and law.

Parties attended and agreed to address the appeal by way of written submissions.

6. The appellant submitted that the respondent claimed he was a general labourer without proof. The respondent was only engaged as a casual labourer on availability of work and paid daily for work done. There was no continuous employment but intermittent employment. In the case of Samuel Wambugu Ndirangu v 2NK Sacco Society Limited [2019] eKLR, the court addressed the necessary ingredients for an employment relationship. There must be proof of payment of wages, which is not the case here.
7. In the case of Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited Cause No.928 of 2010, the court held that without proof of an employment relationship, the court could not preside over such a matter. The respondent cannot claim protection under Section 37 of the *Employment Act*. He did not prove that he was earning Ksh.15, 000 per month as alleged. He only indicated that he would earn a daily wage of Ksh.500 and that the appeal should be allowed.
8. The respondent submitted that the appellant did not submit any work records. The admission that the respondent was employed on casual terms without the work records placed the respondent under the provisions of Section 37 of the *Employment Act*. In the case of Galgalo Jarso Jillo v Agricultural Finance Corporation [2021] eKLR, the court held that under Section 47(5) of the *Employment Act*, where the employee discharges his burden of proof that there was unfair termination of employment, the employer must justify the reasons leading to termination of employment. The appellant failed to discharge this burden. In the case of Muthaiga Country Club v KUDHEIHA Workers [2017] eKLR, the court held that where the employer fails to justify the reasons leading to termination of employment, such results in unfair termination of employment. The respondent is entitled to the prayers sought, and the appeal should be dismissed with costs.



Determination

9. This is a first appeal, and the court must re-evaluate the evidence and arrive at its conclusions. However, the court must consider that the trial court had the opportunity to hear witnesses testify.
10. The appellant has challenged the respondent's allegations of an employment relationship. He was employed on casual terms intermittently when work was available. He was paid for work done, not continuous or on a fixed-term contract.
11. The admission of casual employment placed the appellant under a duty to produce work records. Under Sections 10(6) and (7), read together with Section 74 of the *Employment Act*, the employer must file work records with the court with the claim. Without the records necessary under the law, the employer has failed under its legal duty, and the court is bound to believe the employee and the particulars of the claim.
12. The appellant employed the respondent as a general labourer from 5 May 2020 to 5 November 2021. Under such employment, the respondent was entitled to the protections under Section 37 of the *Employment Act* and to claim the rights and benefits under the Act.
13. Under Section 37 of the *Employment Act*, the respondent was entitled to notice before his employment was terminated under Section 35 of the *Employment Act*. He had a right to be heard before employment terminated and for valid and justified reasons. The appellant did not address these mandatory law provisions under the mistaken belief that it had no legal duty to the respondent or that there was no employment relationship. The due process of the law required the appellant to address these provisions of the law held in *Ombajo v Institute of Certified Public Accountants of Kenya (ICPAK) [2022] KECA 1360 (KLR)*; *City Centre cabs Limited v Nyange [2023] KECA 1116 (KLR)*; and *Aga Khan Hospital Kisumu v Erick Wanjohi [2020] KECA 829 (KLR)*.
14. The trial court analyzed the evidence and correctly held that there was an unfair termination of employment. However, such findings should have followed an analysis of each claim based on the law, evidence, Wage Orders, and specific awards. A general award, as pleaded, should not suffice.
15. Notice pay is due in the case of unfair termination of employment without due process. The Ksh.15,608.70 award is based on the gross minimum wage.
16. Compensation is also due under Sections 45 and 49 of the *Employment Act* upon the finding that there was unfair and unlawful termination of employment. However, the trial court made a general award as pleaded without any reasons or justification. The respondent had claimed the maximum compensation of 12 months. To make a general award as pleaded contrary to set principles, such discretion should be applied judicially before the court can allocate the maximum compensation. See *Kenya Broadcasting Corporation v Geoffrey Wakio [2019] KECA 65 (KLR)*; *Moi Teaching and Referral Hospital v James Kipkonga Kendagor [2019] KECA 833 (KLR)*; and *Ngunda v Ready Consultancy Limited [2022] KECA 577 (KLR)*. The reasons for the given award must be stated.
17. In this case, the respondent worked for under a year. His employment was terminated without due process, and an award of two (2) months' gross wage is hereby found appropriate, all at Ksh.31,217.40.
18. On the other claims, a house allowance is due to a protected employee for the period of employment. The respondent claimed a house allowance for 18 months worked for the appellant. Under the Wage Orders applicable from 5 May 2020, the minimum wage for a general labourer was Ksh.13,572.90 plus the due house allowance of Ksh.2,035.80 and gross salary of Ksh.15,608.70. Hence, an underpayment of wages at Ksh.608.70 x 18 months = Ksh.10,956.60, which is due.



19. The respondent made general pleadings on the claim for overtime pay for an hour each day for 18 years. He did not state when he would start work or end his day. Without giving particulars, the appellant's burden to produce records for this purpose was not necessary, as held in *Rogoli Ole Manadiegí v General Cargo Services Limited* [2016] KEELRC 1607 (KLR) and *Patrick Lumumba Kimuyu v Prime Fuels (K) Limited* [2018] KECA 198 (KLR) that;

It is true the employer is the custodian of employment records. In claiming overtime pay, however, the employee is not deemed to establish the claim for overtime pay by default of the employer bringing such employment records to court. Establishing hours or days served more than the legal maximum rests with the employee. The claimant did not show in the trial court when he put in excess hours when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing precisely how it was arrived at...

20. The general award, including overtime pay, is not justified without the respondent discharging his burden of proof.
21. The employee cannot access statutory dues on the claim for NHIF deductions. In counter, the respondent claimed service pay. Service pay is due without any records to confirm remittances for statutory dues. The claim for Ksh.7,500 is justified.
22. On costs, if the claim is successful, the respondent is entitled to his expenses for the trial court proceedings, and this appeal costs 50%.
23. Accordingly, the appeal is partially successful, as analyzed above. The judgment in Mombasa CMELRC No.E029 of 2022 is reviewed in the following terms;
- a. Compensation Ksh.31,217.40;
 - b. Notice pay Ksh.15,608.70;
 - c. Underpaid house allowance Ksh.10,956.60;
 - d. Service pay Ksh.7,500;
 - e. Costs of the lower court as awarded;
 - f. For the appeal, the respondent is awarded 50% of his costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 23RD DAY OF JANUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

