Matuku v Lex Oilfield Solutions Limited (Employment and Labour Relations Appeal E003 of 2022) [2025] KEELRC 119 (KLR) (23 January 2025) (Judgment)

Neutral citation: [2025] KEELRC 119 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2022

MA ONYANGO, J

JANUARY 23, 2025

BETWEEN

FRANCIS TOM MATUKU ..... APPELLANT

AND

LEX OILFIELD SOLUTIONS LIMITED ..... RESPONDENT

(Being an Appeal from the Judgment and Decree of the Chief Magistrate Court of Kenya at Mavoko by Hon. Bernard Kasavuli (Principal Magistrate) dated and delivered on 28th February 2022 in Chief Magistrate Court at Mavoko ELRC No. 64 of 2020)

JUDGMENT

1. The Appellant was the Claimant in Mavoko ELRC No. 64 of 2020 in which he sued the Respondent for constructive dismissal, underpayment of salary, refusal to pay accrued salary, house allowance, accrued leave and service pay.

2. In the Memorandum of Claim dated 15th September, 2020 the Appellant states that he was engaged by the Respondent as a truck driver on 12th October, 2017 at a salary of Kshs. 25,000. In 2019 he was promoted to the position of driver mentor and his salary increased to Kshs. 30,000.

3. It is the Appellant's averment that on 23rd December, 2019 he was injured while in the course of his duties as a result of which he was hospitalised for 4 days. The injuries he sustained were a fracture of the distal end of the right radius, deep wound on the palm of the right hand and blast injury on the face. As a result of the injury he was completely unable to resume his duties in the months of January, February and March, 2020.

4. The Appellant averred that during this period the Respondent failed/neglected to pay the Claimant's salary as a result of which the Claimant lived in complete destitute conditions. He avers that his attempts to plead for his salary arrears from the Respondent fell on deaf ears. That the intolerable working conditions forced him to leave the Respondent's employment.

5. It was further the Appellants averment that he was paid only basic salary in violation of section 31 of the *Employment Act*. That he was also underpaid as he also doubled up as a turn boy for the entire period he worked for the Respondent. He therefore claims underpayments and house allowance at 15% of basic pay for the period he worked for the Respondent.

6. The Respondent filed a Defence and Counterclaim dated 26th October, 2020 in which it denied terminating the Appellant's employment. It was the Respondent's position that the Appellant was injured while at work on 23rd December, 2019 and it paid for the Appellants treatment until he recovered.

7. It was the Respondent's position that the Appellant failed to report back to work or to submit medical treatment records to justify his absence from work even after the Respondent requested for the same. That instead the Appellant served a demand notice upon the Respondent dated 5th March, 2020.

8. The Respondent prayed that the Claim be dismissed with costs and interest and for punitive damages against the Appellant for wasting the court's time.

9. At the hearing the Appellant testified on 1st November, 2021 that at that particular time he was jobless. He reiterated the averments in his claim and witness statement which he adopted. He testified that at the time of the accident on 23rd December, 2019 he was wearing all PPE but the machine exploded and he was injured. He was rushed to Nairobi Women Hospital, Naivasha Branch where he was admitted for about 4 days. The Respondent paid his medical bills and arranged for his transport home upon discharge.

10. The Appellant testified that the Respondent accused him of overloading and refused to pay his salary for January and February and also declined to take him to hospital for outpatient review after discharge. That he had to relocate to his home village because of high cost of living.

11. He testified that he was not paid salary for January, February and March, 2020. That he was never paid house allowance. That he did work for two people and was not paid for the extra work.

12. On cross examination the Appellant stated that he was issued with terms and conditions of work which he signed. He was not given sick off. He was not terminated and did not resign. He did not fill any leave forms. He denied that he was injured due to his negligence.

13. The Respondent called Valentine Etyang, a logistics coordinator who testified as RW1, Cecilia Mulei, a logistics coordinator who testified as RW2 and Mercy Ndanu, also a logistics coordinator who testified as RW3.

14. RW1 testified that he was a safety officer for the Respondent and his duties entailed training drivers on handling and operating bulk handler. That the Appellant was trained at Bamburi Cement. It was his evidence that the Appellant failed to comply with safety rules. He testified that he went to the site of accident and found that the Appellant had been taken to hospital.

15. On cross examination he stated that the Appellant was a good driver and had no disciplinary issue. That as mentor driver the Appellant trained other drivers. That the accident was caused by build-up of pressure in the bulk during offloading. That it is the pressure that pushes the cement out of the bulker.

16. He testified that operation of bulker does not require a turnboy. That the bulker is part of a truck.

17. RW2 testified that she was the first person to be informed about the Appellant's accident. That she sent RW1 to the site of the accident. She testified that the Respondent paid the Appellant's hospital bills

and allowed other drivers to visit the Appellant at home. That when she asked the Appellant to avail medical documents and receipts through SMS he did not respond. That the Appellant became hostile.

18. On cross examination RW2 stated that the Appellant was employed as a truck driver and his duty was to transport and offload cement to customers. That there was no need of a turnboy.

19. RW3 testified that she was in charge of drivers transporting cement from company to client's site. She testified that the Appellant did not resume work after the accident. That she called him but he did not give a satisfactory answer.

20. In the judgment dated and delivered on 28th February,2022, the trial court dismissed the Appellant's claim with costs to the Respondent on grounds that the Appellant did not prove that his employment was terminated. That the Appellant further did not prove constructive dismissal as set out in Coca Cola East and Central Africa Limited v Maria Kagai Ligaga [2015] eKLR.

21. The Trial court further held that the Respondent had demonstrated that it made efforts to contact the Appellant but he was harsh to them.

22. Aggrieved by the decision, the Appellant filed the appeal herein vide his Memorandum of Appeal dated 8th March 2022 against the entire judgment and decree of the trial magistrate dated and delivered on 28th February 2022 by Hon. Bernard Kasavuli (Principal Magistrate) on grounds THAT the learned magistrate erred in fact and law in: -

    1. failing to find that the Respondent had constructively dismissed the Appellant.
    2. in finding that the Appellant had not proved his case against the Respondent dismissing the case with costs.
    3. in failing to fully analyze the evidence tendered by the Appellant herein and giving undue weight to the Respondent's case and least weight to the Appellant's case.
    4. in believing and relying on the Respondent's submissions without any evidential value attached to them.
    5. in failing to appreciate and to take into consideration the authorities cited by the Appellant in support of his submissions.

23. The Appellant prayed for ORDERS THAT: -

    a. The appeal be allowed.
    b. The Judgment and Decree of Hon. Bernard Kasavuli (Principal Magistrate) be set aside and substituted by an award as prayed for in the Appellant's Memorandum of Claim dated 15th September 2020.
    c. The costs of this appeal and in the Trial Court be awarded to the Appellant.

Appellant's Submissions

24. The Appellant submitted that it is not in dispute that the Appellant sustained serious injuries on 23.12.2019 while in the course of employment with the Respondent; the Appellant was unable to immediately resume his duties as a driver with the Respondent on account of the injuries to his face, arms and hands and the Respondent refused to pay the Appellant's dues of January, February and March 2020.

25. It was submitted for the Appellant that based on the decided cases quoted in the suit and irrefutable facts of the case, the Appellant met the test for constructive dismissal.

26. The Appellant submitted that the trial court failed to consider evidence by the Appellant and wholly relied on the evidence of the Respondent's witness. The trial magistrate held that the Appellant was harsh to the Respondent hence making it difficult to engage in a return to work formula, yet this was not supported by any evidence.

27. The Appellant submitted that the trial magistrate relied on the Respondent's witness testimony in which Cecilia told the court that:

> " ...when she sent the claimant a short message (sms) to avail medical documents, he was very harsh and did not comply. Mercy also told the court that when she called the claimant, he did not offer a satisfactory explanation but instead became very harsh."

28. That the trial magistrate relied on this piece of testimony by the Respondent's witness to find the Appellant's case devoid of merit, yet there was no evidence adduced of the said SMS in court.

29. The Appellant submitted that no explanation was offered by the Respondent as to why the Claimant's 3 months salary was withheld and the Respondent made a unilateral decision to without his dues to his detriment despite serving it since 12.10.2017. It was submitted that it was not enough for the Respondent to state it was paying for treatment expenses for the Appellant. That non-payment of salary is a constructive breach that goes to the root of an employment contract.

30. The Appellant submitted that he claimed underpayment as from October 2017 to December 2019 when he worked as both driver and turn boy and was only receiving the salary of a driver. That the Respondent's Policies and Procedures elaborated that some trucks would operate with turn boys, therefore, the Respondent had the option to employ a turnboy but chose not to.

31. The Appellant submitted that he claimed for an award of house allowance and the payslips produced as evidence proved that the Appellant only received basic salary. He testified that he was not residing within the premises of the Respondent. He was entitled to house allowance equivalent to 15% of his basic pay in accordance with the Regulation of Wages (General Amendment) Order.

32. The Appellant submitted that he had never gone for leave and the Respondent did not produce any annual leave records to disprove his claim of unpaid leave days.

33. The Appellant submitted that he was entitled to service pay as he was in the Respondent's service from October 2017 and had completed 3 years.

Respondent's Submissions

34. The Respondent submitted that it was the onus of the Appellant to prove his claims that he was constructively dismissed. That the trial court was justified to dismiss the suit for lack of evidence on proof of constructive dismissal.

35. The Respondent submitted that the Appellant testified that he absconded work because he was injured and the Respondent declined to cater for his bills. He also alleged that the Respondent's conduct and intolerable working conditions forced him to leave the Respondent's employment and blamed his injuries on unfavourable working conditions and lack of a turnboy. The Appellant failed to prove this as set out in Section 107 of the *Evidence Act*.

36. The Respondent submitted that the Appellant was neither terminated nor dismissed. That he absconded duty. That section 47(5) of the *Employment Act* clearly states that in a claim of unfair termination or wrongful dismissal the burden of proving the ingredients of unfairness lies with the employee.

37. The Respondent submitted that the Appellant breached his employment contract by refusing to comply with the statutory requirement of providing sick off sheets, communicating harshly to his superiors, failing to provide medical receipts as requested and deserting his work. It submitted that the Appellant also admitted that he failed to issue one months termination notice in accordance with his letter of appointment.

38. The Respondent submitted that the Appellant made it difficult to engage in a return-to-work formula since he was hostile to his superiors and failed to engage in negotiations. It was submitted that the Respondent provided evidence of all these assertions.

39. The Respondent further submitted that the Appellant failed to prove indirect discrimination, constructive dismissal and unfair/illegal termination. That the trial court was justified to find the Respondent did not violate Section 45 of the *Employment Act*.

40. The Respondent submitted that since the Appellant has failed to prove his claim for constructive dismissal, he is not entitled to any of the terminal dues sought in the memorandum of claim.

41. The Respondent submitted that the Appellant failed to return to work in the months of January, February and March 2020. He neither resigned nor was his employment terminated. The Appellant is therefore not entitled to 12 months compensation or the alleged unpaid salary as prayed since he was not dismissed by the Respondent.

42. The Respondent submitted that the issue of underpayment did not arise as in the Appellant's letter of appointment dated 12.10.2017 and promotion letter dated 17.09.2019, he was employed as a truck driver and not a turn boy. The Appellant's monthly salary was in tandem with the Regulations of Wages (General) (Amendment) Order 2017 and 2018. Further, upon his promotion, the Appellant was being paid a higher amount than what is prescribed.

43. The Respondent submitted that the Appellant did not satisfactorily prove that he was performing the tasks of a turn boy therefore his claim under this limb must automatically fail.

44. The Respondent submitted that the Appellant received a monthly gross salary and not a basic salary as claimed, thus, the salary paid to the Appellant was inclusive house allowance.

45. The Respondent submitted that its witness testified that the Appellant went on leave on various dates as per the agreement between the parties. During cross-examination, the Appellant confirmed the Respondent never denied him leave and that he proceeded on leave prior to the accident. Further, the Appellant's counsel declined to allow the Respondent to produce signed leave forms by the Appellant as exhibits during the hearing.

46. The Respondent submitted that it produced evidence that it complied with statutory requirements to deduct and remit the applicable statutory dues to Kenya Revenue Authority, the National Social Security Fund and the National Hospital Insurance Fund as required by law. Therefore, the remedy of service pay is not available to him.

Analysis and Determination

47. It is now settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and facts and come up with its own findings and conclusions. [See: Court of Appeal for East Africa in Peters v Sunday Post Limited [1958] EA 424]. The appropriate standard of review established in cases of appeal can be stated in three complementary principles:

    i. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

    ii. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

    iii. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different results if it were hearing the matter for the first time."

48. It is therefore the duty of this court as a first appellate court to re-evaluate the evidence and arrive at its own conclusions. In so doing the court must take into account that it had no opportunity to hear and see witnesses, and therefore must make an allowance for that. (See: Selle & Another v Associated Motor Boat Co. Ltd & Another (1968 (E.A. 123).

49. Having considered the Memorandum of Appeal and Record of Appeal, having further considered the submissions of the parties, the issue for determination is whether the Trial court erred in dismissing the Appellant's claim on grounds that he had deserted duty.

50. Section 44(4)(a) of the *Employment Act* provides that an employer has a right to summarily dismiss an employee who without leave or other lawful cause, absents himself from the place appointed for the performance of his work.

51. Section 41 provides that before dismissing an employee on grounds of misconduct under section 44(4) an employer must hear and consider any representations which the employee may make in respect of the grounds of misconduct.

52. In *Mombasa Coffee Limited v Shuke (Appeal E075 of 2022)* [2024] KEELRC 444 (KLR) (29 February 2024) (Judgment) the court held that an employer alleging that an employee absconded duty must, where the employee denies absconding, demonstrate what action he/she took when the absconding occurred. The employer may do so by demonstrating that he issued a notice to the employee to show cause why he could not be dismissed and/or disciplined, or that he made efforts to find out the employee's whereabouts by either sending emails, making phone calls to the employee or contacting the employee's family or the contacts furnished by the employee at the time of employment.

53. It was further held in the case of RICHARD KIPLIMO KOECH –VS- YUKO SUPERMARKET LTD [2015] eKLR that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of Section 41 of the *Employment Act* obtain. The Court stated as follows:-

> " Absence from work without permission or lawful cause is one of the grounds upon which an employer may summarily dismiss an employee. Absence without permission falls under misconduct and pursuant to Section 41 of the *Employment Act*, 2007, a hearing is necessary.
>
> And in my view, it is incumbent upon an employer who alleges that an employee has absconded to make reasonable attempts or efforts to reach the employee and seek any

explanation to excuse itself from the application of Section 41 of the *Employment Act*, 2007. A prudent employer such as the Respondent will invariably keep contact details of its employees."

54. In the instant case the Appellant was absent but not without permission or lawful cause. The Respondent was aware that he was away because he had been involved in an accident in the course of duty. The Respondent states that it even sent other employees to visit the Appellant at his home where he was recuperating.

55. The Respondent's averment that the Appellant absconded duty is therefore not borne out of the uncontested facts of the case. What the Respondent averred is that the Appellant failed to submit medical records to justify his absence. It is stated that he was contacted through WhatsApp messages which are stated to be on record but which are not included in the record of Appeal. This court therefore does not have the benefit of those messages.

56. Be that as it may be, the relevant issue is whether, after the Appellant failed to submit the medical records, the Respondent sent him a notice to show cause why he should not be dismissed for absconding duty. The evidence on record points to the fact that this was not done.

57. The other relevant issue, which the Appellant stated in his claim, was that his salary was not paid for January and February, 2020. According to the Appellant, he was accused of overloading the truck and after that he was abandoned.

58. In the evidence on record from the proceedings and the witness statements and specifically that of Mercy Ndanu Kiio (RW3), it was stated that the relief driver sent to take over the truck after the Appellant's accident was flagged along Gilgil weighbridge for flouting KENHA axle weight regulations and a fine of Kshs. 100,000 imposed on the Respondent. This was blamed on the negligence of the Appellant. What is not clear and which was not explained, is how the truck could have been overloaded when at the time of the accident it was being offloaded, and why this was blamed on the Appellant who was not driving the truck at the time.

59. The Respondent did not as much as mention the issue of the Appellant's salary for January and February, 2020 even though in his Memorandum of Claim his reason for considering himself constructively dismissed was non-payment of the salary. This was also clearly stated in the demand letter and was not responded to.

60. The Appellant testified that:

> "The Respondent knew I had been injured. The Respondent paid for my 1st treatment charges. They hired a taxi which took me home to Kitengela and another driver given my duties. I was told that driver carried overload and from that time, Respondent declined to come for me. From January-March, 2020, the Respondent did not pay me. I had to relocate home due to high cost of living.
>
> I abandoned work because I was injured and company had declined to cater for my bill. I had no disciplinary case"

61. The Respondent did not controvert this evidence. From the evidence it is clear that the Appellant was constructively dismissed.

62. The medical bills filed by the Respondent are only up to 3rd January, 2020. This confirms the Appellants averments that he was abandoned by the Respondent after that date.

63. In the witness statement of Mercy Ndanu Kiio, RW3 she states that: "The Claimant was advised by the Respondent to use his National Hospital Insurance Fund (NHIF) card in his chosen outpatient facility hospital which is Kitengela Medical Hospital and the Respondent would cater for the Claimant's transport expenses but the advice did not sit well with him instead he kept asking for money for his treatment and medicine"

64. The withholding of salary without formally communicating to the Appellant the reason for doing so amounted to constructive dismissal. As has been held in many decisions of this court, an employer cannot let an employee operate on unclear assumptions. An employer must at all times clearly communicate its position to an employee. If it fails to do so the non-action will be interpreted in favour of the employee.

65. In the instant case the Respondent ought to have written a letter to the Appellant explaining what was required of him and the consequences of failing to do so. In the absence of such communication the burden cannot be shifted to the employee.

66. From the forgoing I find that the trial Court erred in holding that the Appellant did not prove that he was constructively dismissed.

Remedies

67. Having found that the Appellant was constructively dismissed and therefore unfairly terminated, I now turn to his prayers.

68. The Appellant prayed for compensation. Having been unfairly terminated he is entitled to compensation for unfair termination of his employment. Taking into account all the circumstances of his case especially the length of service and the manner in which the termination of employment occurred, and taking into account all the relevant factors under section 49(4) of the *Employment Act*, I award the Claimant 6 months' salary as compensation in the sum of Kshs. 228,870 based on gross pay of kshs. 38145 which should have been his salary at the basic minimum wage for heavy commercial driver plus the increment of Kshs. 5000 he was added for being a mentor. The explanation is at paragraph *70* below.

69. The Appellant prayed for underpayments. He was employed as a driver which is a more senior position than a turnboy whose role he alleges to have undertaken and the basis of this prayer for underpayments. This prayer has no basis and is dismissed.

70. The Appellant stated that he was not housed and not paid house allowance. His salary was Kshs. 25,000 up to September, 2019 when it was increased to Kshs. 30,000 per month. The salary of a driver of a heavy commercial vehicle under all former municipalities including Mavoko where the Respondent operated from May, 2017 was kshs. 27,449.65 plus house allowance of Kshs. 4117.50 at 15% of basic salary making a total of Kshs. 31,567 and from May 2018 it was Kshs. 28,822.10. Inclusive of house allowance the salary should have been Kshs. 33,145.40. The Claimant was thus underpaid by Kshs. 6567 from October, 2017 to April, 2018, a period of 7 months being (6567x7=45,969) and Kshs. 8,145.40 from May, 2018 to December, 2019, a period of 20 months, being (8145x20=162,900). He is entitled to these amounts each month to the last day of work in March, 2020. The increase in his salary should have been on these sums. I award him Kshs. 208,869 on this head.

71. The Appellant further prayed for accrued leave for the entire period worked. None of the Respondent's witnesses adduced any evidence on leave. No documents were filed by the Respondent to controvert the averment by the Appellant that he did not take leave.

72. I award him leave for the entire period worked at 21 days per year worked being 53.75 days. Leave is always based on basic salary. The Claimant's gross salary was Kshs. 38145 less 15% house allowance which the Appellant was entitled to at the time of termination of his employment which makes the basic salary Kshs. 32,423.25. He is thus entitled to Kshs. 67,029 which I award him.

73. The Appellant is not entitled to severance pay under section 40 of the Act as he was not declared redundant. He is also not entitled to service pay under section 35(5) of the Act as he was a member of NSSF.

74. The Appellant is awarded salary for January, February and March, 2020 which he was not paid.

Conclusion

75. Having found as above, I make the following orders:

    a. The Appeal is allowed

    b. The Judgment and Decree of Hon. Bernard Kasavuli (Principal Magistrate) is set aside and substituted by an award as follows:

        i. Compensation Kshs. 228,870.

        ii. Underpayments Kshs. 208,869.

        iii. Annual leave Kshs. 67,029.

        iv. Salary for January, February and March, 2020 Kshs. 114,435.

    c. The costs of this appeal and in the Trial Court are awarded to the Appellant.

    d. Interest shall accrue from date of judgment on item (i) and from date of lower court judgement on items (ii) to (iv).

DATED, DELIVERED AND SIGNED AT ELDORET THIS 23RD DAY OFJANUARY, 2025.

M. ONYANGO

JUDGE