



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ayuma v Omunga (Appeal E220 of 2023)  
[2025] KEELRC 673 (KLR) (28 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 673 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
APPEAL E220 OF 2023  
NJ ABUODHA, J  
FEBRUARY 28, 2025**

**BETWEEN**

**LYDIA AYUMA ..... APPELLANT**

**AND**

**FRANCISCA OMUNGA ..... RESPONDENT**

*(Being an appeal arising from the entire Judgment of Honourable H.M  
NG'ANG'A (PM) delivered in MC. ELRC No. 160 of 2019 on 9th October, 2023)*

**JUDGMENT**

1. Through the Memorandum of Appeal dated 31<sup>st</sup> October, 2023, the Appellant appeals against the whole of the Judgment of Honourable H. M. Ng'ang'a delivered on 9<sup>th</sup> October, 2023.
2. The Appeal was based on the grounds that:
  - i. The Learned trial court erred in law and in fact by dismissing the Claimant's case with cost to the Respondent.
  - ii. The Learned trial court erred in law and in fact by failing to analyse and determine each particular claim independently and give reason why the court cannot grant the prayer sought.
  - iii. The Learned trial court erred in law and in fact by failing to consider the oral and documentary evidence and the filed submissions of the Claimant, by so doing ended up making erroneous decision thus dismissing the Appellant's case.
  - iv. The Learned trial court erred in law and in fact by failing to interpret and apply the provisions of the Employment Act in the Claimant's case hence denied justice to the Claimant.
  - v. The Learned trial court erred in law and in fact by failing to recognize that while the issue on the date of employment was in dispute the burden of proof lied with the employer to prove the



correct date of employment of the employee as provided under section 74(1). The employer must keep record of all his employees, thus in this particular case the Respondent never proved her case.

- vi. The Learned trial court erred in law and in fact by failing to consider the evidence as adduced by the Appellant that she was not a contributor to NSSF institution, therefore she was entitled to be paid service for the period worked.
  - vii. The Learned trial court erred in law and in fact by failing to apply the law properly. If at all the Appellant was terminated on account of redundancy, as provided under section 40(1) then the Respondent failed to follow the procedure as per the provisions of the law. However, the magistrate turned a blind eye on the issue and decided in favour of the Respondent against the appellant.
  - viii. The Learned trial court erred in law and in fact by failing to recognize that every employee is entitled to be issued with certificate of service upon termination of employment unless the employment has continued for a period of less than four consecutive weeks. The Claimant has worked for the Respondent for 7 years. However, the trial court went ahead to deny, to grant this prayer.
  - ix. The learned trial court erred in law and in fact by failing to consider and determine each prayer separately and by reason of lumping them together all the prayers in the memorandum of claim ended up making erroneous judgment.
  - x. The Learned trial court totally misapprehended the facts of the case leading to erroneous application of the facts in to law.
3. The Appellant prayed that the Appeal be allowed with costs and the Judgment of the trial court in the CMELRC No 160 of 2019 be set aside and judgment be entered in favour of the Appellant.
  4. The Appeal was disposed of by written submissions.

### **Appellant's Submissions**

5. The Appellant's advocates Ann Nyasuguta Ondande & Company Advocates filed written submissions dated 14<sup>th</sup> October, 2024. Counsel submitted on the respective prayers sought in the lower court starting with one month notice pay stating that the Appellant was entitled to the same as per section 35 as read together with section 36 of the *Employment Act*. That during hearing the Appellant testified that she was never served with any written notice. That on 3<sup>rd</sup> October, 2018 she was given permission by the Respondent to go look for school fees from friends after her request to borrow money from her employer was declined. That on returning home in the evening she found that the Respondent had brought in a new employee in her place. That on the same day she was told to leave since her services were not needed. That she was not paid salary in lieu of notice. That the trial court failed to consider that the Appellant had proved this fact but failed to award her the same violating the above provisions.
6. On the prayer for underpayment counsel submitted that the Appellant worked for the Respondent in Nairobi as a house help and the minimum wage was Kshs 12,926/= against Kshs 11,000/= received every month which was less by Kshs 1,926/= . That between 2015-2018 she had accumulated underpayments of Kshs 111,765/=. That the burden of proof of the underpayment shifted to the Respondent and the trial court did not consider this fact and decided in favour of the Respondent.
7. On the prayer for accrued leave counsel submitted that the Appellant alleged that in seven years she worked for the Respondent she never went on leave. That she could only be given a few days during



Christmas holiday and she was never paid for the said leave. That the Respondent did not table any document in court to illustrate that the Appellant went on leave or she was paid for the same. That this went against the provisions of section 28 of the Employment Act on entitlement to leave and this court should relook at this claim.

8. Counsel submitted that the trial court erred to consider that while the issue of date of employment was disputed the Respondent had the burden to prove the same as the custodian of employment records under section 74 of the Employment Act to produce record of correct date of employment
9. Counsel submitted that the Appellant was entitled to be paid service for the years she worked. That she was not a member of a registered pension or provident fund scheme under Retirement Benefit Act. That the Respondent was not remitting any funds on behalf of the appellant to any scheme such as NSSF. That the Appellant was entitled to service pay at 15 days per every completed year in the 7 years worked of Kshs 52,201/=.
10. Counsel submitted that the Appellant was terminated unfairly. That during hearing she demonstrated how unfair her termination was. Counsel relied on section 45 and 49 of the Employment Act on the instances the employer may terminate employment of their employee. That the entire judgment of the trial court should be set aside while allowing the Appellant's prayers as illustrated above including 12 months salary as compensation for unfair termination.
11. Counsel urged the court to rely on the cases of Kaiga V Das (Employment & Labour Relations Claim 2 of 2023) KEELRC 2194(KLR) 22 September 2023(Judgment), Kariki Limited vs Karimi (Employment & Labour Relations Appeal E005 of 2023) (2024) KEELRC 217 (KLR) 9 February 2024(Judgment) and Mugo HSC Vs Mugo 2 Others (Employment & Labour Relations Cause E001 of 2024) (2024) KEELRC 1273 (KLR) 23 May,2024(Judgment).

### **Respondent's Submissions**

12. The Respondent's Advocates Owiti, Otieno & Ragot Advocates filed written submissions dated 30<sup>th</sup> October, 2024 and on the issue of whether the trial court erred in dismissing the Appellant's entire suit with costs to the Respondent, submitted that in a claim for unfair termination the burden of proving that unfair termination occurred rests on the employee while the burden of justifying the grounds for termination rests on the employer while relying on section 47(5) of the Employment Act. That the employee needs to discharge this burden of proof by placing before the court a prima facie evidence suggesting that an unjustified termination has occurred. That once employee makes a prima facie case the burden of proof shifts to the employer to justify the termination.
13. Counsel relied on the case of Josephine M. Ndungu & Others v. Plan International Inc (2019) eKLR on burden of proof. The Appellant did not place before the trial court prima facie evidence suggesting that termination had occurred. That the Appellant stated that the Respondent had travelled upcountry and on coming back the Appellant requested her to help her with some money to pay school fees for her grandchildren which the Respondent declined. That she requested for one day off to go get school fees and on returning back she found the Respondent had already replaced her and told her she no longer needed her services. She alleged that the Respondent asked her to calculate her dues which she said she did not know how to calculate with no evidence.
14. Counsel submitted that during cross-examination the Appellant confirmed that she asked for off day but the Respondent did not give her permission but she proceeded to go on off day and reported the following day. That she was sent money on 7<sup>th</sup> October,2018 which she deemed little and returned it. That the Appellant did not produce any evidence to show that she was terminated by the Respondent and if the same was substantively and procedurally unfair. That the Appellant having failed to discharge



her burden the Respondent could not assume the burden of proof under section 43, 45 and 47(5) of the Act to justify the reasons for termination. That the Appellant could not claim unfair termination and the remedies thereof.

15. Counsel submitted that the Appellant gave inconsistent dates of when she was terminated by stating that she was terminated on 3<sup>rd</sup> October, 2018 on cross examination but the letter to Kenya Human Rights Commission stated she was terminated on 4<sup>th</sup> October, 2018. That the Appellant unilaterally terminated her own employment and she asked for her dues which could be confirmed from Mpesa transactions which the Appellant reversed.
16. Counsel submitted that the Appellant on being denied the loan she requested for became abusive towards the Respondent and thereafter left in the evening and did not show up to work on 5<sup>th</sup> October, 2018 and despite several calls from the Respondent she did not pick or return the said calls. That the Appellant reported to work on 6<sup>th</sup> October, 2018 albeit late and did not offer any explanation on her whereabouts for the previous day. That she suddenly started shouting at the Respondent and caused a scene at the residence attracting unwarranted attention from neighbours. That the Respondent politely requested the Appellant to leave her house and come back when she was calm so that they could have a meaningful discussion but the Appellant refused and asked for her dues evidencing her intention not to return to the Respondent's employment.
17. Counsel submitted that the termination was at the instance of the Appellant and section 41, 43 and 45 of the Act would not come in to play. Counsel relied on the case of Daniel Mueke V Bhogals Auto World (2014) eKLR on the issue of employee leaving work station hence repudiating his employment contract. That this was a classic case of voluntary negation with the Appellant ignoring calls to come back to work. That the Appellant's actions amounted to absconding of duties without justification and or notice which warranted summary dismissal under section 44(4) of the Act. Counsel relied on the case of Banking, Insurance & Finance Union (Kenya) v Barclays Bank of Kenya Ltd (2014) eKLR.
18. Counsel submitted that the Respondent had the option of effecting summary dismissal on the grounds of absenteeism and use of abusive or insulting language under section 44(4) of the Act which is a valid reason but instead paid the Appellant her dues which she requested for evidencing her intention not to return to work. That she paid her dues amounting to Kshs 44,000/= being one month's salary in lieu of notice of Kshs 11,000/= and service pay of Kshs 33,000/=. That she sent the money on 7<sup>th</sup> October, 2018 which the Appellant reversed. That the trial court found that the Respondent tried what was possible to comply with procedural guidelines.
19. On the issue of whether the Appellant was entitled to the reliefs sought counsel submitted that the Appellant was not entitled to one- month salary in lieu of notice as she voluntarily resigned when she demanded for her dues. That the Appellant was not entitled to underpayments as the same was not proved. That no evidence was produced to show that she was underpaid as no minimum wage order was produced for the period in question.
20. Counsel further submitted that service pay was not payable as the Respondent did not terminate the Appellant's employment. That her termination was not one contemplated under section 35 of the Act and service pay under section 35(5) could not apply. Counsel relied on the case of Matsesho v Newton (Cause 9 of 2019) (2022) KEELRC 1554(KLR) that the employee terminated on gross misconduct was not entitled to service pay.
21. Counsel submitted that even if the Respondent had made the payment it was ex gratia which does not render any liability for the same while relying on the case of Evans Onguso & 2 Others Versus Peter



Mbugua & 4 Others (2020) eKLR on the ex gratia payment which does not arise from any concrete agreement or any basis in law hence does not constitute a right of claim.

22. Counsel further submitted that the Appellant's claim for overtime and leave that the Appellant did not provide any documentation or evidence to prove that she was entitled to the same. That the Appellant did not produce prima facie evidence which would have required the Respondent to then provide evidence to the contrary if at all under section 10 of the act which places the responsibility of producing records of employment on employer as read together with section 112 of the *Evidence Act*. That the documentation provided by the Respondent showed that the Appellant went on leave and took a total of 138 days as leave instead of the 126 days she was entitled to and no proof to the contrary was provided by the Appellant.
23. Counsel submitted that the Appellant was not entitled to compensation for unfair termination having not placed prima facie evidence that she was unfairly terminated. That the Appellant was not entitled to any of the reliefs sought and the appeal should be dismissed with costs to the Respondent.

### **Determination**

24. It is settled law that the duty of the first appellate court is to re-evaluate the evidence in the subordinate court both on points of law and facts and come up with its own findings and conclusions as held in Court of Appeal for East Africa in Peters –vs- 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.
25. In this case, the Judgment of the trial court was that the Claimants' claim was dismissed with costs and interests to the Respondent while declaring that the Claimant's dismissal by the Respondent was fair and lawful. The court further held that it could not rewrite parties' contract and the Claimants had not established their case. The Appellant appealed against the whole of the Judgment. The court finds that the issues placed by the parties for determination in the appeal are with regard to whether the trial court was right when it held that the Appellant was fairly terminated and if the trial court erred by disallowing the reliefs sought by the Appellant.

### **Whether the trial court erred by finding that Appellants' termination of employment was fair and lawful.**

26. It was not in dispute that the Appellant was an employee of the Respondent engaged as a house girl for six-seven years. It is also common ground that issues arose when the Appellant requested money from the Respondent for school fees and the same was declined. The Appellant alleged that she sought off day to go get the money from her friends and on returning back she was replaced. The Respondent on the other hand alleges that the Appellant left on the evening of 4<sup>th</sup> October, 2018 took an off on 5<sup>th</sup> October, 2018 and came back on 6<sup>th</sup> October, 2018 albeit late without her permission and explanation of her whereabouts.



27. The Respondent alleged that she deemed the Appellant to have absconded work. The appellant further used abusive language against the respondent which in her view was gross misconduct. That she caused termination of her own contract when she requested for her dues evidencing that she was not ready to continue working for her. It is also a common ground that on 7<sup>th</sup> October, 2018 the Respondent sent the Appellant her dues which included one month salary in lieu of notice and service pay which the Appellant reversed stating it was little.
28. The court appreciates that section 47(5) of the *Employment Act* places the burden of illustrating that unfair termination has occurred on the employee. The employer is called upon by the same section to justify the grounds of termination. This court agrees with the trial court findings that the Appellant did not discharge this burden since she requested for her dues which were paid but she reversed meaning she repudiated her own contract.
29. The fact that she also took an off day without permission of her employer amounted to absconding of duties which was a gross misconduct and the respondent was at liberty to summarily dismiss her but she opted not to take that route. The Court of Appeal in the case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR held as follows: \_
14. Section 47 (5) of the Act provides for the procedure to be followed in matters of complaints of unfair termination as follows:
- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.” [Emphasis added]
- So that, the appellant in this case had the burden to prove, not only that his services were terminated, but also that the termination was unfair or wrongful. Only when this foundation has been laid will the employer be called upon under section 43 (1): "to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”
15. We have carefully examined the testimony of the appellant in relation to the discharge of his evidential burden but we are afraid it does not lay the necessary foundation to require the employer's response under section 43.
30. This court therefore agrees with the trial court that the Appellant did not discharge her burden of proving that unfair termination occurred. The Respondent was gracious enough to pay her one Month salary in lieu of notice when it her who was entitled to such notice and service pay which the Appellant reversed stating it was little.
31. The issue of redundancy does not arise since parties continued with their engagement despite the letter of termination of April 2018 which was to take place on 31<sup>st</sup> May,2018. The trial court observed the same on this issue. The court upholds the trial court finding that the Appellant was fairly and lawfully terminated.



**Whether the trial court erred by disallowing the reliefs sought by the Appellant**

32. This court having found that the Appellant was fairly terminated, she was not entitled to any damages for unfair termination or notice pay since she terminated her own contract without notice to the Respondent.
33. On underpayment, the same needs to be specifically proved by the Appellant by providing the relevant minimum wage orders which she did not. The prayer for leave pay, the Appellant alleged that the Respondent did not produce documents to show she went on leave as the custodian of employment records under section 74 of the Act. The Respondent showed that the Appellant went on leave for 138 days instead of 126 days hence she was not entitled to the same.
34. On the prayer for service pay since the Respondent offered the same to the Appellant who reversed and since she did not prove the unfair termination she was not entitled to the same.
35. In the upshot the Appeal is hereby found without merit and is hereby dismissed with costs.
37. It is so ordered.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**DELIVERED VIRTUALLY THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**ABUODHA NELSON JORUM**

**PRESIDING JUDGE-APPEALS DIVISION**

