



REPUBLIC OF KENYA



KENYA LAW
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**Icom Engineering Co. Limited v Juma (Appeal 136 of 2022)
[2025] KEELRC 516 (KLR) (24 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 516 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL 136 OF 2022
NJ ABUODHA, J
FEBRUARY 24, 2025**

BETWEEN

ICOM ENGINEERING CO. LIMITED APPELLANT

AND

NAHASHOM NYABANDE JUMA RESPONDENT

(Being an appeal arising from the Judgment of Honourable E. Kagoni (PM) delivered in Milimani Chief Magistrates Court, MC. ELRC No. 1071 of 2020 on 1st July, 2022)

JUDGMENT

1. Through the Memorandum of Appeal dated July 13, 2022, the Appellant appeals against the whole of the Judgment of Honourable E. Kagoni (PM) delivered on 1st July, 2022.
2. The Appeal was based on the grounds that:
 - i. The Learned Magistrate erred in law and in fact in finding that the Respondent's termination was unfair.
 - ii. The Learned Magistrate erred in law and in fact in finding that the Respondent is entitled to payment in lieu of notice of the circumstances amounting to the sum of Kshs 16,900.00.
 - iii. The Learned Magistrate erred in fact and in law in computing the Respondent's salary on a monthly basis and awarding damages amounting to the sum of Kshs 67,600.00.
 - iv. The Learned Magistrate erred in fact and in law in computing and awarding overtime of the sum Kshs 224,640.00 to the Respondent without any basics.
 - v. The Learned Magistrate erred in fact and in law in computing the Respondent's payment in lieu of leave and awarding Kshs 81,900.00.



- vi. The Learned Magistrate misrepresented the law in finding that the Respondent is entitled to housing allowance amounting to the sum of Kshs 227,733.49.
 - vii. The Learned Magistrate erred in fact and in law in awarding Kshs 50,700.00 as service pay.
 - viii. The Learned Magistrate erred in fact and in law in totally disregarding the Appellant's defence and evidence on record.
3. The Appellant prayed that the Appeal be allowed and the judgment of the lower court delivered on 1st July,2022 be set aside.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's Advocates P. C Onduso & Co. Advocates filed written submissions dated 8th February 2024. Counsel urged the court to relook at its submissions filed at lower court on 28th March,2022 in their entirety.
6. On the arguments before this court counsel submitted that the Learned Magistrate found that since the Appellant's witness had admitted that they did not provide the Respondent herein with a house allowance then in his view this entitled the Respondent to a prayer for house allowance. That it was contrary to what the Appellant's witness said in cross-examination that, they did not provide the Respondent with a house allowance which was inclusive of salary.
7. Counsel submitted that section 31(2) does not apply to an employee whose contract of service contains a provision for consolidated salary as part of the basic wage or salary of the employee.
8. Counsel relied on the case of ELRC No. 1124 of 2017 : Trevor Marambe vs For You Chinese Restaurant [2021]eKLR and submitted that a house allowance is a monthly entitlement which accrues at the end of every month and to a continuing injury where not paid.
9. Counsel submitted that the claim for accrued house allowances dates back to 1st January 2011 and the suit was lodged on 19th June 2017 therefore the only valid part of the claim was rent accruing from 19th June 2016. That the Respondent was terminated on 26th November,2016 hence claims for accrued house allowances for the years 2011,2012,2013,2014,2015 and January to May 2016 were statute barred. That the Respondent should be awarded house allowance for five months between June 2016 to November 2017.
10. Counsel relied on the case of Arasa & Another vs Benori Agencies and Services Limited (case 242 of 2017 (2022) KEELRC 2016 and submitted that 15% of basic pay is reasonable for house allowance which should be adopted by court.
11. On the question whether the Respondent was unfairly dismissed, counsel relied on section 49(1) (a) of the *Employment Act* while submitting that compensation was one of the remedies within the discretion of the court having regard to the circumstances under which the Respondent absconded. Counsel submitted that no more 2 months' salary ought to be awarded as compensation as urged in the case of ELRC No. 1124 of 2017: Trevor Marambe vs For Your Chinese Restaurant (2021) eKLR.

Respondent's Submissions

12. The Respondent's Advocates Thiong'o Law Advocates filed its submissions dated 5th June 2024 and on the issue of whether the learned Magistrate erred in law and in fact in finding that the Claimant was an employee and not a casual labourer, counsel submitted that it was the Respondent's testimony that



he started working for the Respondent in August 2014 as a plumber at Nairobi Hospital which had at the time contracted the services of the Appellant company and not 2019 as alleged by the Appellant. That in support of his position the Respondent produced his job card indicating his designation as a plumber. That during cross-examination DW1 confirmed to the court that the Appellant company had at one point been contracted by Nairobi Hospital.

13. Counsel further submitted that DW1 upon being referred to the first payment schedule which was produced by the Respondent he turned around to allege that the same was included erroneously and it was used to raise fraudulent claims. That DW1 confirmed that the identity number on the said document was that of the Respondent. That DW1 confirmed that he did not produce an attendance schedule that would be key in guiding the court to determine the duration Respondent worked with Appellant. Counsel submitted that it was the Respondent's position that the Appellant deliberately omitted to produce the schedule of attendance so as to conceal vital information and defeat the course of justice.
14. Counsel relied on the case of Stanley Mombo Amuti v Kenya Anti-Corruption Commission [2019] eKLR and submitted that failure to call a particular witness or voluntarily produce documents or objects in one's possession is concealing evidence. That the fact that the first payment schedule was not dated does not discredit the contents of the said document but further goes to prove that the Respondent indeed worked for the Appellant long before 2019.
15. Counsel relied on section 2 of the Act on definition of casual employee and submitted that the Appellant produced part of work records being the acknowledgment note for the year 2019 and 2020 and he was initially paid weekly and thereafter fortnightly and that he served beyond the time period allowed for a casual employee as defined under the Act.
16. Counsel submitted on the provisions of Section 37 of the *Employment Act*, which provides on the conversion of casual employment to term contract and that according to Section 35(3), an employee who works continuously for two months or more from the date of employment as a casual employee shall be entitled to such terms and conditions of service as he would have been entitled to had he not initially been employed as a casual employee.
17. Counsel relied on the case of Francis Ndirangu Wachira v Betty Wairimu Maina [2019] eKLR and submitted that where a casual employee is not terminated at the end of the day and continues to work continuously for over a month up to and until over three months, then the law converts the same into a contract term employment. That the act of keeping the Respondent/Claimant under casual employment for long periods going was contrary to section 9 of the Act and in violation of fair labour practices.
18. On the issue of whether the learned Magistrate erred in law and fact by finding that the termination of the Respondent's employment was unfair, counsel submitted that the learned Magistrate was proper in holding that the termination of the Respondent's Employment was unfair within the meaning of section 45 of the *Employment Act*.
19. Counsel relied on the case of Joseph Mwaniki Nganga v United Millers Limited [2022] eKLR and submitted that to arrive at a determination of a fair or an unfair termination, the reason(s) for the Respondent's termination, and the procedure adopted in effecting the termination are paramount.
20. On the issue of whether there was a valid and fair reason for terminating the Respondent's service, counsel submitted that sections 43, 45(2), and 47(5) of the *Employment Act*, 2007, places the burden of proof of the reasons for termination on the employer. That the reason why the Respondent was terminated from his employment was because he was not agreeable to the deduction of a sum of Kshs.



- 1500/- from his wages. That no explanation was given for the said deduction and the Appellant did not furnish its employees with a notice of the intended deduction prior to effecting the same.
21. Counsel submitted that DW1 confirmed to the court that the Appellant had not produced any written notice confirming that it had furnished the Respondent and its employees in general a reason and timeline for the deduction. That he justified the said deduction on allegation that the same was a condition precedent demanded by the main contractor owing to the incessant theft at construction sites.
 22. Counsel relied on Section 17(1) of the *Employment Act* on protection of wages and section 19(1) on circumstances when employer may deduct wages of employee submitting that the justification given by the Appellant did not fall among those given and that the alleged incessant theft was not attributed to the negligence and/or dishonesty of the Respondent. That no OB number was produced by the Appellant confirming the said theft cases had been reported for investigations. That no correspondence was produced by the Appellant between it and the contractor to show that the same was a demand.
 23. On the issue of whether fair procedure was followed counsel submitted that it was DW1's testimony that the Respondent opted to leave employment on his own accord. That the Appellant did not produce any document that the Respondent voluntarily resigned.
 24. Counsel relied on the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR and submitted that it is not open to the employer to simply plead abandonment of duty by an employee as evidence of termination of the contract. The employer must demonstrate that he has taken reasonable steps to find out the whereabouts of the employee and required him to resume duty to no avail.
 25. Counsel submitted that in the absence of any evidence of follow up and/or enquiry as to the whereabouts of the Respondent the Appellant cannot plead abandonment/voluntary leaving of employment by the Respondent.
 26. Counsel submitted that DW1 confirmed that no notice to show cause was issued to the Respondent and neither was he accorded a disciplinary hearing to enable him make his representations and defend himself in view of the provisions of section 41 of the *Employment Act*, 2007. That the procedure adopted in the termination of the Respondent fell short of the statutory threshold hence unfair termination as held by the trial court.
 27. On the issue of whether the Learned Magistrate erred in law and in fact in awarding the reliefs, counsel relied on the case of *Humphrey Nyaga Thomas & 25 others v Kenyatta University* [2021] eKLR and submitted that the conversion and protection of the casual employee under the provisions of section 37 of the Act is important as the employee becomes entitled to the rights and benefits under the Act.
 28. Counsel submitted that the Respondent was entitled to one-month's salary in lieu of notice having been unfairly terminated without notice. That he was entitled to damages for unfair termination and urged this court to award him 12 months compensation instead of 4 months compensation awarded by trial court as per section 49 of the Act.
 29. Counsel submitted that the Respondent was entitled to overtime as held by the trial court of Kshs 224,640.00. That DW1 confirmed to the court that the Respondent was working from 7:30 am to 5:30 pm and he conceded he did not have proof of payment of the alleged overtime. That as per Regulation 5 of the Regulation of Wages (General) Order, normal working week was 52 hours yet he worked for 60 hours hence overtime of 8 hours a week.
 30. Counsel submitted that the Respondent was entitled to unpaid leave of Kshs. 81,900.00 as awarded by the trial court as per section 28 of the *Employment Act*. That the Respondent was never accorded leave



despite working for 6 years. That the Appellant did not produce attendance schedule/ duly filed leave application forms and counsel relied on the case of Trevor Marambe vs For You Chinese Restaurant (2021) eKLR urging the court allow accrued leave.

31. On Housing Allowance, Counsel submitted that nothing was tendered in evidence in the form of a pay slip or any other evidence to support the allegation that the Respondent's/Claimant's salary was a consolidated and as such the learned Magistrate was proper in allowing the award for housing allowance.
32. Counsel relied on the above case of Trevor (supra) and submitted that Section 31(2) of the *Employment Act*, envisages such consolidation where then, the employer is not expected to pay a separate amount as house allowance. Nothing was produced in evidence to show that indeed, the Claimant's salary was consolidated.
33. On service pay counsel submitted that DW1 admitted that they did not remit the Respondent's NSSF and NHIF payments and the Respondent having worked for the Appellant for 6 years the trial court was right in awarding him Kshs 50,700.00 as service pay.

Determination

34. The court has considered the Memorandum of Appeal, the record and submissions filed by the both parties herein observes that the principles which guide this court on an appeal from a trial court are now well settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must 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 allowances in this respect”

35. In this case, the Judgment of the trial court was that judgment was entered in favour of the Claimant against the Respondent while finding that the termination was unfair. The claimant in the trial court was awarded, one-month salary in lieu of notice Kshs. 16,900/=, overtime Kshs. 224,640/=, unpaid leave Kshs 81,900/=, housing allowance Kshs. 227,733.49/=, service pay Kshs 50,700/= and 4 months' salary as compensation for unfair termination Kshs 67,600/=, certificate of service together with costs and interests.
36. The Appellant appeals 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 Respondent was an employee of the Appellant, that he was unfairly terminated and if he was entitled to reliefs sought.
37. This court has therefore come up with two main issues;
 - i. Whether the trial court erred by finding that Respondent's termination of employment was unfair and unlawful
 - ii. Whether the trial learned Magistrate erred in awarding the Respondent his terminal dues.



Whether the trial court erred by finding that Respondent's termination of employment was unfair and unlawful

38. The Respondent was an employee of the Appellant from August, 2014 to September, 2020 when the Respondent alleged he was terminated for refusing to be deducted Kshs 1,500/= from his pay without any explanation or notice to even the other employees. The trial court found that the Respondent's termination was unfair both substantively and procedurally.
39. The courts have always held that for termination to pass fairness test there should be both substantive and procedural fairness. This court refers to the holding in Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR among others.
40. This court is of the view that Respondent had a duty under section 47(5) of the *Employment Act* to prove that unfair termination occurred and the trial court found that the Respondent had illustrated that unfair termination had occurred. The burden then shifted to the Appellant to illustrate that the reasons for the termination were fair under the said provision.
41. The Appellant alleged that the Respondent absconded duties for two months. Under Section 44(4) (a) of the *Employment Act* 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. In the case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR, the court held that:-
- “Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.
42. The Appellant claimed desertion/absconding of duty in September, 2020 yet the Respondent stated that he was terminated for objecting to deductions from his salary. In addition, if the Respondent absconded duties the Appellant did not demonstrate that it commenced any disciplinary action against the Respondent under Section 41 of the *Employment Act*.
43. It was 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.
44. In Joseph Nzioka v Smart Coatings Limited [2017] eKLR Nduma J. observed that
- “Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employee concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.”
45. In the present case, the Court is not satisfied that the Appellant had on a balance of probabilities discharged its onus before the trial court of establishing that the Respondent absconded/deserted duty. This court therefore agrees with the trial court's finding that the Appellant did not have fair reasons to terminate the Respondent's service.
46. On the procedural fairness as provided for under section 41 of the *Employment Act*, this court notes that the same was never adhered to as the Appellant did not issue any show cause letter to the Respondent over the issue of deserting/absconding of duties. The Respondent was never invited for any disciplinary hearing hence the Appellant violated the clear provisions of section 41 of the Act.



In the case of Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited [2014] eKLR the Court stated that: -

Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.

47. In conclusion this court agrees with the trial court decision that the Respondent's termination was both substantively and procedurally unfair and unjustified.

Whether the trial learned Magistrate erred in awarding the Respondent his terminal dues.

48. On the issue of the trial court awarding the Respondent 4 months' salary as compensation for wrongful dismissal, the Appellant faults the same as excessive and suggested 2 months. The Respondent on the other hand suggested that this court should award him 12 months compensation. The respondent however never filed a cross-appeal on this issue. The Court having looked at the evidence before the lower court, that court's appreciation of the same and the award generally, is satisfied that four month's salary as compensation was reasonable in the circumstances and would not disturb the same. In the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR it was held that:

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

49. This court will therefore disturb the awards herein if it is proved that the trial court misdirected itself in some matter hence arriving at a wrong decision. This court notes that the award of compensation is discretionary but guided by considerations set out under Section 49(4) of the *Employment Act*.
50. The award of one-month's salary in lieu of notice was also justified after finding the Respondent was unfairly terminated without notice as provided for under section 35 of the *Employment Act*. This Court will therefore not disturb this award.
51. On the claim for leave pay, housing allowance and overtime this court agrees with the trial court and proceeds to add that these claims in nature are continuing injuries which the Claimant must file their suit within 12 months after cessation of employment as per section 90 of the *Employment Act*. This court notes that the employment relationship herein ended in September, 2020 and the claim was filed immediately in October, 2020. In the court of Appeal in G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR the court held as follows:-

Regarding 'a continuing injury', the proviso to Section 90 of the *Employment Act* requires that the claim be made within 12 months next after the cessation thereof. The learned Judge did not determine when the continuing injury ceased, for purposes of computing the twelve month period. In the absence of a defined period, the learned Judge erred in concluding that the claims had no limitation of time. Further, upon the claimant's dismissal, any claim based on a continuing injury ought to have been filed within one year failing which it was time barred.



52. In the Recent Court of Appeal decision in *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA 894 (KLR) (24 July 2023) (Judgment) while relying on India decisions the court had this to say :-

Normally, a belated service related claim will be rejected on the ground of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.

53. From the above decisions it is clear those reliefs fall under continuing injury which were filed within 12 months.
54. On the issue of overtime, it was clearly shown that the Respondent was working for 60 hours a week instead of 52 hours a week hence this award is upheld. On the issue of housing allowance, the Appellant did not produce any evidence that the Respondent's salary was consolidated. This is a requirement under section 31 of the *Employment Act* hence the court upholds the award by the trial Court.
55. On the issue of leave, in *S S Dhillon Transporters (K) Ltd v Wamiti* (Appeal E041 of 2023) [2024] KEELRC 13620 (KLR)(18 December 2024) (Judgment) it was stated as follows:-

“The appellant admitted and even in submissions that the respondent was not granted the right to annual leave on the basis of off days. Annual leave is a basic right of employees that cannot be taken away on the basis of off days which was not even proven. The court has in various decisions held that leave falls under continuing injury claims hence accrued every year is not granted as long as the employee was not allowed to take the same. Where the employee had a chance to take leave and fails to do so the same is limited to 18 months under section 28(4) of the *Employment Act* as held in *Abongo v Chemelil Sugar Co Ltd (Appeal E051 of 2022)* [2023] KEELRC 2591 (KLR) (25 October 2023) (Judgment) Justice Radido in a claim for untaken leave for 76 days...

In the instant case the Appellant admitted that the Respondent had no chance to take leave. Annual leave is a claim in the nature of continuing injury. The Court of Appeal in *The German School Society & another v Ohany & another* [2023] KECA 894 (KLR) considered cases of continuing injury ...”

56. From the above proposition it is now settled that unpaid leave forms part of continuous injury which cannot be taken away by off days. The Appellant did not produce before the trial court, attendance schedule or leave application forms and this court upholds the trial court decision that the Respondent was entitled to the same.
57. On the issue of service pay the court agrees with the trial court findings that the Appellant did not illustrate that it remitted the NSSF and NHIF dues for the Respondent hence he was entitled to the same.



58. In the upshot the Appeal is found unmerited and is hereby dismissed with costs.

59. It is so ordered.

DATED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2025

DELIVERED VIRTUALLY THIS 24TH DAY OF FEBRUARY, 2025

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

