



REPUBLIC OF KENYA



KENYA LAW
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**Transport Messenger AU Bondo Limited v Owuor (Appeal E007 of 2024)
[2025] KEELRC 446 (KLR) (20 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 446 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E007 OF 2024
M MBARŪ, J
FEBRUARY 20, 2025**

**BETWEEN
TRANSPORT MESSENGER AU BONDO LIMITED APPELLANT
AND
CLEOPAS OTIENO OWUOR RESPONDENT**

*(Being an appeal from the judgment of Hon. Nelly Chirchir delivered
on 31 January 2024 in Mariakani CM ELRC No. E020 of 2021)*

JUDGMENT

1. The appeal arises from the judgment in Mariakani ELRC *Cause No.E020 of 2021*. The appellant is seeking that the judgment be set aside with costs.
2. The background of the appeal is a claim filed by the respondent, Cleopas Otieno Owuor. He claimed that he was employed by the Appellant from 17 October 2017 to 7 January 2021, first as a turnman and later as a supervisor when the Appellant terminated his services. He was earning a monthly salary of Kshs. 25,000 at the time of separation. He stated that he was a contributing member of NSSF. He had not utilized his leave days. The decision to terminate his services was unfair, unprocedural and unlawful and made the following claims;
 - i. One Month’s salary in lieu of notice Kshs. 15,000.00
 - ii. Unpaid leave (3) years Kshs. 31,500.00
 - iii. Unpaid 3 months salary Kshs. 41,141.00
 - iv. Compensation for unfair termination Kshs. 180,000.00
 - v. Costs of the suit.



3. In response, the appellant denied the claims and maintained that the Respondent was in its employment between 2017 to 2018 and further that it did not terminate the respondent's services as he absconded from his duties. He abandoned his lorry by the roadside leading to clamping by the County Government. The Appellant also stated that the Respondent had utilized his leave days and could not pay his salary for three months that the Respondent did not work. The appellant filed work records.
4. The learned magistrate delivered judgment and held that there was an unfair termination of employment and awarded the respondent the following;
 - a. 8 months compensation Ksh.120,000;
 - b. Notice pay Ksh.15,000;
 - c. 2 years leave pay Ksh.21,000;
 - d. Certificate of service;
 - e. Costs of the suit.
5. Aggrieved, the appellant filed the appeal on the grounds;
 1. The Learned Magistrate erred in fact and law in not finding that the Respondent had not proved his case to the required degree of proof.
 2. The Learned Magistrate erred in law and in fact in not finding that the Respondent was not employed by the Appellant and in finding that the Respondent was an employee of the Appellant.
 3. The Learned Magistrate erred in law in finding that the Provisions of the Employment and Labour Relations Act were applicable in this case.
 4. The Learned Magistrate erred in fact and law in finding that the Respondent was wrongfully dismissed from work.
 5. The Learned Magistrate erred in fact and law in not finding the Respondent was not an employee but was a casual worker called on a mere basis and paid as per the work done.
 6. The Learned Magistrate erred in law and in fact in not adequately considering the evidence contained in the M-pesa Payment Print out and thus not arriving at a finding that they showed that the Respondent was not an employee of the Appellant.
 7. The Learned Magistrate erred in law and in fact in shifting the burden of proof from the Respondent, then a Claimant to the Appellant then the Respondent.
 8. The Learned Magistrate erred in law and fact in finding that the Respondent was entitled to payment as an employee who had been illegally terminated.
 9. The Learned Magistrate erred in law and fact by treating the evidence tendered by the Appellant so perfunctorily which made her arrive at a wrong and unjust decision.
 10. The Learned Magistrate erred in law and fact in wholly relying on the evidence of the Claimant without considering the evidence of the Respondent and their submissions.
 11. The Learned Magistrate erred in law and fact in making findings which were a total misdirection from the provisions of the law.
6. On the appeal, the parties agreed to address through written submissions.



7. The appellant submitted that a party who alleges must prove under Section 109 of the Evidence Act. In this case, the respondent, as the claimant, failed to prove his case to the required standard. Section 47(5) of the *Employment Act* provides. This discharged the appellant from its duty under Section 43(1) of the *Act*. Without establishing a prima facie case, the appellant had no burden to discharge.
8. The Respondent claimed that he was employed as a supervisor, and in cross-examination, he stated that his salary was paid through the bank. He did not provide his bank statements for post-2018 to confirm that he was in employment and receiving a salary. Both the Appellants confirmed that there was no written contract between the parties. In the case of *D.T Dobie v Wanyonyi Wafula Chebukati* (2014) eKLR, the court held that the burden was on the respondent to prove his case on a balance of probability and that such burden is not lessened even if the case was heard by way of formal proof, this is the threshold to be met. In this case, the respondent failed to prove that he was employed between 2019 and 2021, as required.
9. The appellant submitted that the provisions of the Employment Act were not applicable in this case and that the Respondent was wrongfully dismissed from work. While repairing a lorry as a casual labourer, the respondent abandoned the motor vehicle allocated to him. Under Section 44(4) (a) of the *Employment Act*, absconding of duty by an employee without leave/ permission or lawful cause amounts to gross misconduct by the employee. The employer of such an employee becomes entitled to commence disciplinary action against such employee under Section 41 of the Employment Act. In *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR, the court held that dismissal due to absconding duty must be preceded by evidence showing that a reasonable attempt was made to contact the employee concerned. 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.
10. In this case, there was no employment. The appellant had no duty to hear or summon the respondent. The respondent stopped his employment in 2018 and thereafter was engaged on a need-basis, hence the payments by M-pesa. These payments were random, and there was no proof of a wage of Ksh.15,000 per month. The awards by the trial court were without merit, and the appeal should be allowed with costs.
11. The respondent submitted that he proved his case to the required degree under Section 47(5) of the *Employment Act*. The awards by the trial court were justified and should be confirmed with the dismissal of the appeal.
12. The respondent submitted that the appellant did not submit any document to demonstrate that employment was terminated through notice. The Mpesa payments confirm an employment relationship where the respondent worked as a supervisor after working as a turnman. There are payments from October 2020 to January 2021. Employment was terminated unfairly contrary to the principles outlined in *Kenfreight (E.A) Limited v Benson K. Nguti* [2016] KECA 409 (KLR) and the case of *Walter Anuro vs Teachers Service Commission* (2013) eKLR.

Determination

13. This is a first appeal, and the court must review the record, reassess the findings, and make a conclusion. However, the trial court should have had the opportunity to hear the witnesses.
14. The appellant's case is that the parties had no employment relationship. The company's operations were affected by the SGR, and they laid off the respondent and other employees in 2018. Subsequently, he would be called on a contract basis for work done, such was paid through Mpesa.



15. The respondent's case was that he worked for the appellant from 2018 to 2021 when his employment was terminated unfairly. He was paid to work continuously as a supervisor.
16. Both parties admitted that there was no written employment contract.
17. The appellant conceded that the respondent would be allocated duties when there was work. Mr John Otieno Mware testified that;

... By November 2020, December 2020, and January 2021, he [respondent] was on a casual basis. He abandoned a truck he was test-driving. ...
18. Failure to regulate relations at the shop floor in writing results in a claim such as herein. Sections 8, 10, and 18 of the Employment Act allow an employer to give terms and conditions of employment in writing through a written contract, fixed-term contract, or piece-rate work.
19. The appellant allowed the respondent, an alleged casual employee, to take its vehicle for test driving. Such an asset was not secured under any written agreement. This can only mean one thing: the respondent was a trusted employee of the appellant and had served as claimed from 2018 to 2021 when he abandoned the allocated vehicle by the roadside, leading to clamping by the County Government.
20. However, under Sections 2, 7 and 8 of the Employment Act, an employee who is employed as a casual or under an oral contract and continues to work for periods beyond a day or is allocated duties not likely to end each day is protected under Section 37 of the Employment Act. The employee enjoys the rights and benefits under the Act.
21. The failure to summon the respondent when he abandoned the vehicle by the roadside on 7 January 2021 to address such misconduct only exposed the appellant. Indeed, as submitted by the appellant, section 44(4) of the Employment Act allows an employer to terminate employment through summary dismissal for gross misconduct. However, the employee must be summoned to give his responses. In Walter Anuro vs Teachers Service Commission (2013) eKLR, the court held that even where the employer has a valid and genuine reason to terminate employment, there must be both substantive justification and procedural fairness.
22. The learned magistrate properly analyzed the evidence and record and found that employment was terminated without due process and was unfair. The respondent is entitled to notice pay and compensation.
23. The claim for Ksh.15 000 in notice pay is justified.
24. The claim for 12 months was reduced to 8 months. The award was justified because the respondent had worked for over 3 years. There was no other consideration.
25. The evidence that the respondent abandoned his motor vehicle by the roadside, forcing the County Government to clamp, was not contested. This conduct does not place the respondent in good standing. His conduct was not justified despite the unfair termination of his employment due to lack of due process. The award of 8 months was not rationalized in this regard as required under Section 45(5) of the Employment Act. The discretion to award compensation can be interfered with if not applied judicially. In the case of Munyua v Aruasa & 3 others [2024] KECA 1696 (KLR), the court held that in assessing compensation, high awards are reserved for instances where the conduct of the employer has been callous, actuated by ulterior motives, malicious or in bad faith.
26. In this case, the appellant paid the respondent his wages for November, December 2020, and January 2021. These payments are admitted. The fact that the respondent abandoned the allocated vehicle by



the roadside is not contested. This was an act of gross misconduct. An award of three (3) months is hereby found appropriate at Ksh.45, 000.

27. Section 28 gives a right of 21 days on accrued leave, but leave due should not be accumulated for over 18 months under Section 28(4) of the *Act*. In this case, 33 days are due at Ksh.17, 500.
28. On the claim for three months' pay, the respondent admitted he was paid through Mpesa for November, December 2020, and January 2021.
29. The respondent's claim on costs had a good foundation. His costs are due as awarded by the trial court. For the appeal of the analysis above, each party is to bear its costs.
30. Accordingly, the judgment in Mariakani CM ELRC *No.E020 of 2021* is hereby reviewed in the following terms;
 - a. Compensation Ksh.45,000;
 - b. Notice pay Ksh.15,000;
 - c. Leave pay Ksh.16,500;
 - d. Costs for the lower court as awarded;
 - e. For the appeal, each party is to bear its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 20TH DAY OF FEBRUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

