



REPUBLIC OF KENYA



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**Musyoka t/a Jana Pestcon v Mnyika (Appeal E186 of 2024)
[2025] KEELRC 376 (KLR) (13 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 376 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E186 OF 2024
M MBARÚ, J
FEBRUARY 13, 2025**

BETWEEN

JOHN KIVUNZI MUSYOKA T/A JANA PESTCON APPELLANT

AND

DAMIAN RUNGUYA MNYIKA RESPONDENT

*(Being an appeal from the judgment of Hon. G Sogomo delivered
on 9 August 2024 in Mombasa CMELRC No.E183 of 2023)*

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMELRC E183 of 2023, delivered on 9 August 2024. The appellant seeks that the judgment be set aside and substituted with an order dismissing the claim with costs.
2. The background to the appeal is a claim filed by the respondent before the trial court. His case was that he was employed by the appellant as a driver on 1 November 2018 at Ksh.15, 000 per month without a house allowance. His duties involved garbage collection and supply of sanitary bins to various clients. On 23 November 2022, while the respondent was on duty with his colleagues and one loader, Samuel Babu Mwalimu, he entered a client's home for their signature while the rest loaded the vehicle. He heard screams and, turning back, he found the vehicle he had parked had rammed into other parked vehicles, occasioning damage. It emerged that the loader, another appellant employee, had decided to move the vehicle but lost control, leading to the accident. The respondent and the loader were both arrested and upon investigation, the police charged the loader. The appellant was dissatisfied with the police's conclusion and punished the respondent.
3. The respondent claimed that on 15 December 2022, the appellant directed the respondent to sign a document seeking him to accept liability for the accident and pay damages for the damaged vehicles.



The respondent refused, and the appellant issued him a notice of summary dismissal. This resulted in unlawful and unfair termination of employment. He claimed terminal dues;

- a. Notice pay Ksh.25,804.15;
 - b. Underpayments
November 2018 to May 2022 for 43 months at Ksh.15, 000 instead of Ksh.23, 039.40 due Ksh.345, 694.20;
June 2022 to December 2022 for 6 months at Ksh.15, 000 instead of 25,804.15 due Ksh.64, 824.90
 - c. Unpaid house allowance
November 2018 to May 2022 for 43 months at 15 % Ksh.150, 345.63;
June 2022 to December 2022 for 6 months at 15% Ksh.23, 223.74;
 - d. Accrued annual leave for 4 years ksh.72,251.62;
 - e. 12 months compensation Ksh.309,649.80;
 - f. Costs of the suit.
4. In reply, the appellant's case was that the respondent, as a driver, was not allowed to give their vehicle to another driver or other people unless authorized. On 23 November 2022, the respondent allowed Samuel Babu Mwalimu to drive his assigned vehicle registration KBZ 534E Isuzu; he was not authorized to make such an allocation, leading to multiple accidents and damage to other vehicles and motorbikes. The respondent and Mwalimu were arrested, and the respondent was released on bail pending investigations. Upon release, the respondent did not attend work and only returned to make a demand for his terminal dues. He was directed to collect his show cause notice at the office but declined and filed suit. In the given circumstances, the appellant could not carry out disciplinary proceedings.
5. The response was that due to the respondent's actions, there was damage to third-party vehicles and motorbikes at a cost of Ksh.180, 000. The allegations that the respondent was forced to sign a liability agreement are without proof. He refused to accept the show cause notice. There was no termination or dismissal from employment as alleged. The respondent absconded duty, and his claims for notice pay, underpayments, house allowances, and damages are not due.
6. The learned magistrate heard the parties and delivered judgment on 9 August 2024 and held that employment was terminated unlawfully and unfairly and the respondent was entitled to the following dues;
- a. Notice pay;
 - b. House allowance;
 - c. Leave pay;
 - d. 6 months compensation;
 - e. Certificate of service;
 - f. Costs of the suit.
7. Aggrieved, the appellant filed an appeal on the grounds;



1. The trial magistrate erred in law and fact by failing to find that the respondent did not provide any supporting evidence to demonstrate that he was terminated from work.
2. The trial magistrate erred in law in fact by failing to take into account the appellant's evidence that the respondent had absconded duty therefore arriving at an erroneous decision that the respondent had been unlawfully terminated.
3. The trial court erred in law and fact in making an award of damages in favour of the respondent notwithstanding that the claim had not been proved.
8. The parties agreed to address the appeal by written submissions.
9. The appellant submitted that they employed the respondent as a medium-sized vehicle driver, and while carrying out his duties, he was involved in an accident by allowing an unauthorized driver. The incident was reported to the police, and the respondent was released on bail pending investigations. He absconded duty, refused to resume work and filed his claim alleging unfair termination of employment. The trial court allowed the claim, and aggrieved, the appellant filed this appeal.
10. The appellant submitted that the trial court failed to consider the response. He who alleges must prove. The burden was on the respondent to show that he was unfairly terminated upon his absconding duty after causing an accident, leading to significant damage to the appellant and third parties. Absconding duty is gross misconduct, which allows for summary dismissal. The respondent refused to collect the show cause notice for absenteeism upon which the provisions of Section 41 of the *Employment Act* should have followed, as held in *Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] eKLR*. Employees must show up and explain why they are absent from work without permission.
11. In this case, instead of attending work, the respondent opted to file suit. He failed to take account of his gross misconduct, damage to the vehicle allocated to him, and the accident, which led to loss and damage to third parties. The claims awarded by the trial court should be set aside, and the claims should be dismissed with costs.
12. The respondent submitted that he was employed as a medium-sized vehicle driver at a wage of ksh.15,000, which was an underpayment without a house allowance. The events of 23 November 2022, where another employee of the appellant took over the allocated vehicle and caused an accident, were investigated by the police, and the colleague was found culpable. The demand by the appellant that he should accept liability was not justified. This resulted in unfair termination of employment without due process on 15 December 2022. The demand notice issued on 21 December 2022 was justified due to the unfair summary dismissal.
13. The trial court analyzed the evidence well and arrived at the correct finding. In the case of *Peter Otabong Ekisa v County Government of Busia [2017] eKLR*, the court held that the standard of proof under Section 47(5) of the *Employment Act* requires the employee to adduce a prima facie case that there were no valid reasons for termination of employment. On the other hand, the employer should justify the reasons leading to the termination of employment, which is lacking in this case.
14. In the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited [2022] eKLR*, the court held that an employer could not simply plead desertion of duty. The employer must demonstrate the efforts taken to trace the employee. The allegations that the respondent deserted duty upon release on bail on 23 November 2022 until 21st December 2022, when he served demand notice, are not supported by any evidence. This resulted in unfair termination of employment as held in *Godfrey Anjere v Unique Suppliers Limited [2015] eKLR*. The appellant did not follow the mandatory provisions of Section 41 of the *Employment Act*. There were no justified reasons to terminate employment. If the appellant



was dissatisfied with police investigations, subjecting the respondent to execute an agreement accepting liability for damages of Ksh.180, 000 was unfair and unlawful. The alleged absconding of duty was only used to force the respondent to execute the agreement on liability by force.

15. The appeal is without merit and should be dismissed with costs.

Determination

16. This is a first appeal. The court must reevaluate and reconsider the evidence on record, allowing room for the lack of an opportunity to see and hear the witnesses firsthand and draw conclusions and inferences.

17. The duty of a first appellate court was established by the Court of Appeal in *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123 in the following terms:

An 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 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 allowance in this respect. In particular, this court is not necessarily bound to follow the trial judge's findings of fact if it appears either that he has failed on some point to take account of particular circumstances or probabilities.....or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.

18. The appellant's case is that on 23 November 2022, the respondent, as a driver of motor vehicle registration KBZ 534E Isuzu, allowed an unauthorized driver, his colleague Mwalimu, to drive it, leading to an accident. The accident damaged other third-party vehicles and motorbikes at a loss of Ksh.180, 000. The respondent was arrested with Mwalimu and later released on bail. He did not resume work until 15 December 2022, when he returned but refused to collect the notice to show cause for absenteeism. Instead, he served his pleadings and claim on 21 December 2022. There was no termination of employment as alleged, and the respondent's conduct caused loss and damage to the appellant; hence, the awards by the trial court should be set aside.
19. The respondent's case is that the police investigated the accident and charged his colleague Mwalimu. The appellant's direction that he should accept liability by signing the agreement on 15 December 2022 was not justified and resulted in unfair termination of employment, and the trial court well addressed his claims on the merits.
20. Arrest by the police following an accident is a legal requirement. The attendant traffic and criminal procedures are regulated under different regimes, unlike employment and Labour relations disputes.
21. Where an employee is arrested by the police following a traffic offence, though closely connected to his employment, the police investigations do not stop the employer from undertaking internal disciplinary proceedings against the subject employee. Whatever outcome of police investigations is not a bar to internal disciplinary proceedings on the shop floor. Whereas the traffic case required proof beyond a reasonable doubt, disciplinary proceedings at the shop floor are regulated under Section 41 of the *Employment Act* as held in *Banking, Insurance and Finance Union [Kenya] v Consolidated Bank of Kenya Limited* [2014] KEELRC 354 (KLR).
22. Further, unless the employer communicates to the employee that the outcome of the criminal or traffic case would dictate the internal disciplinary proceedings, the employee cannot argue that he cannot be



- disciplined because the police investigations did not find him culpable. See *James Mugeru Igati v the Public Service Commission of Kenya* [2014] e-KLR.
23. The respondent's refusal to attend work after 23 November 2022 was an act of gross misconduct as defined under Section 44(4) (a) of the *Employment Act*. The show cause he was directed to collect on 15 December 2022 was justified. However, upon deciding to do so and opting to file suit against the appellant, the appellant did not address the show cause with a conclusion. The option to allow the claim to take its due course was an abdication of a legal duty under Section 41(2) of the *Employment Act*.
 24. The employer must bring the employment relationship to a close. Where the employee fails to attend work, the employer must issue notice to the employee to attend and address the issue with a conclusion. Leading the employee at large because he has filed suit is to invite a claim for alleged unfair termination of employment as herein done.
 25. Where the employee fails to attend work upon notice to show cause, the employer is bound under Section 18(5) (b) to terminate employment and serve notice. If the employee cannot be traced for service and to secure itself, the employer is required to issue notice to the Labour Office. The circuit of the employment relationship must be brought to an end by the employer in the given circumstances.
 26. In this case, the trial court addressed the facts, applied the law, and properly found that there was both unlawful and unfair termination of employment.
 27. The award of notice pay and compensation was justified. The compensation awarded took into account the years worked and the lack of due process in addressing the alleged assignment of duty. However, the trial court was bound to consider the events leading to the termination of employment. The respondent was invited to take the show cause notice but filed suit. His case was that he had not been found culpable by the police in the traffic case, whereas he was the employee responsible for motor vehicle registration no. KBZ 534E Isuzu. As the authorized driver, he allowed an unauthorized driver to take charge and caused an accident, leading to a loss of Ksh.180, 000 to the appellant.
 28. Such gross misconduct should have been addressed under Section 45(5) (b) of the *Employment Act*. The employee's culpability is a significant factor in assessing the compensation due. In the case of *Inside & 2 others v West Kenya Sugar Company Limited* [2023] KEELRC 1090 (KLR), the court held that the employee's conduct should be considered when the court is applying its discretion to award compensation. In the case of *Kimongo v Shrink Pack Limited* [2024] KECA 678 (KLR), the court held that an employee who was constantly absent from work without permission was not entitled to the award of compensation even where there was no due process in termination of employment. This position is reiterated in *Lilian W Mbogo-Omollo v Cabinet Secretary, Ministry of Public Service & Gender & Attorney General* [2020] KEELRC 43 (KLR), where the court made an award of Ksh.10 for unfair termination of employment taking into account the conduct of the employee. In the case of *Hamisi v Modern Coast Express Limited* [2024] KEELRC 1557 (KLR), the court considered the conduct of the employee leading to termination of employment and awarded zero (0) compensation.
 29. In this case, the respondent's conduct cannot be justified as allowing another unauthorized person to drive his allocated vehicle. The loss and damage to the appellant arose out of his conduct. The trial court's discretion to award compensation is hereby interfered with, and the award of zero (0) is found appropriate.
 30. Notice pay is, however, due based on the last gross wage for one month.
 31. The claims addressed the reasons leading to the termination of employment, and the trial court correctly analysed each claim on the merits.



32. On the claim for underpayments, a driver operating a medium-sized vehicle from 1 November 2018 under the Wage Orders had a minimum wage of Ksh.23,039.40 and a house allowance of 15% Ksh.3,455.91; the total gross is Ksh.26,495.31. The appellant paid the respondent Ksh.15, 000 per month without the provision of a house allowance. There was an underpayment of Ksh.11, 495.31 for 43 months from November 2018 to May 2022. The due underpayment and house allowance is ksh.494, 298.33
33. From June 2022, the wage changed to 25,804.15 plus a house allowance of Ksh.3, 870.65, for a total due of Ksh.29, 674.75. On the wage paid at Ksh.15, 000, there was an underpayment and a house allowance of Ksh.14, 74.75. The total underpayment is Ksh.88, 048.65.
34. The total due in underpayments and house allowance is Ksh.582, 346.65.
35. The trial court allowed the claim for accrued leave days for four (4) years. However, under Section 28(4) of the *Employment Act*, accrued leave cannot be accumulated beyond 18 months without approval by the employer. In this case, the respondent is only entitled to annual leave for 33 days based on his last basic wage of Ksh.25, 804.15, amounting to Ksh.28, 384.56.
36. Under section 19 of the *Employment Act*, the employer can deduct losses and damage incurred by the employee due to negligent performance of his duties on the awards due at the end of employment. The accident led to a loss of Ksh.180, 000 due to the respondent's conduct and negligence of duty. Such an amount is deductible from his dues.
37. According to the assessment above, each party should meet its costs for the trial court and this appeal.
38. Accordingly, the appeal analyzed judgment in Mombasa CMLECR No.183 of 2023 is hereby reviewed in the following terms;
 - a. Employment terminated unfairly;
 - b. Compensation zero (0);
 - c. Notice pay ksh.29,674.75;
 - d. Underpayments and house allowances Ksh.582,346.65;
 - e. Leave pay ksh.28,384.56;
 - f. The dues (b), (c), (d), and (e) shall be paid less Ksh.180,000 for damage incurred by the respondent to the property of the appellant;
 - g. Each party is to bear its costs for this appeal and trial court proceedings.

DELIVERED IN OPEN COURT AT MOMBASA THIS 13 DAY OF FEBRUARY 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

