Assen & another v Khamunya (Employment and Labour Relations Appeal E135 of 2021) [2025] KEELRC 369 (KLR) (12 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 369 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E135 OF 2021

HS WASILWA, J

FEBRUARY 12, 2025

BETWEEN

JOHANESS ASSEN .... 1ST APPELLANT

BONNIE WENDY JOY .... 2ND APPELLANT

AND

JULIUS AMAYI KHAMUNYA .... RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of Honourable E.M.Kagoni, in Nairobi MCELRC No. 1627 of 2019 between *Julius Amayi Khamunywa v Johaness Assen and Bonnie Wendy Joy* delivered on 7th July, 2022, where the Appellants herein were the Respondent and the Respondent was the Claimant. The grounds of the Appeal are as follows: -

   1. That the Learned trial Magistrate erred in law and in fact in finding that the Respondent/ Claimant was actually employed by the Respondents/ Appellants.
   2. That the Learned Magistrate erred in law and in fact in law holding that the Respondent was employed by the two Respondents when in fact he admitted he was interviewed by one.
   3. That the Learned trial Magistrate erred in law and in fact in finding that the claimant was-wrongfully/unlawfully dismissed from employment.
   4. That the learned Magistrate erred in law and in fact in finding that the claimant/Respondent worked during public holiday's when in fact no evidence was tendered to prove the same.
   5. That the Learned Magistrate erred in law and in fact in finding that the claimant never went for annual leave when in fact he had gone for excess days

6. That the Learned trial Magistrate erred in law and in fact in finding that the Respondents had not been paid salary for two months and proceed to award the same.

7. That the Learned Magistrate erred in law and in fact in finding that the Respondents never resisted the claim for overtime when in fact it was denied in paragraphs 6, 7 and 8 of the defence dated 9th December 2019.

8. The Learned Magistrate erred in law and in fact in awarding overtime to the tune of Kshs.1,085,529.60 for somebody who had worked for about 2 years without showing how the amount was reached/calculated.

9. That the Learned Magistrate erred in law and in fact in awarding damages which was not applicable or awardable in the circumstances.

10. The learned Magistrate erred in law and in fact in calculating what the Respondent was entitled, if any.

2. The Appellants sought for the following orders: -

    1. An order for stay of execution be issued pending hearing and determination of the Appeal.

    2. That the Respondent was lawfully terminated and therefore not entitled to reliefs sought in lower court.

    3. That the calculation as to the amount the Respondent was entitled was wrongly done.

    4. That the Respondent was not entitled to overtime allowance, Holiday allowance or any damages.

3. Summary of the facts is that The Respondent in this appeal filed a Memorandum of Claim dated 6th September 2019, alleging unlawful and unfair dismissal by the Appellants and failure to adhere to the rules governing summary dismissal as provided for under the Employment Act.

4. The Respondent was employed as a driver by the Appellants from May 2017 until his dismissal in July 2019. On 16th July 2019: After driving the 1st Appellant to Jomo Kenyatta International Airport, the Respondent returned to the Appellants' residence, where he was handed a termination letter. The letter indicated that the Appellants had concluded they could no longer retain him as an employee due to various alleged misconducts. The Respondent was not issued with a notice of intention to terminate his services or given an opportunity to defend himself against the allegations. The Respondent was also not registered under any pension scheme throughout his employment. At the time of his dismissal, he was earning a monthly salary of Kshs. 18,000, was never provided with housing or house allowance, and was paid in cash without receiving payslips or any employment documentation. His working hours were from 6:00 a.m. to 8:00 p.m., and he was never compensated for overtime, work done on public holidays, or annual leave, which he was neither granted nor compensated for. His duties included driving the Respondents and their children to school, as well as running errands. A notice of intention to sue was sent to the Respondents, but they ignored or neglected to respond.

5. The events leading to the dispute were that on 16th July 2019, the Respondent was terminated after receiving a letter from the Appellants' secretary. The letter alleged that the Respondent had, on various occasions, reported to work excessively drunk and disorderly and had stolen USD 100 and Kshs. 40,000 from the 1st Appellant and his friend. The Respondent denied the allegations and asserted that the alleged thefts had never been reported to the police. He was never given a chance to defend himself

against the accusations. A demand letter and a Fargo courier receipt were sent to the Appellants, but they failed to respond.

6. The Respondent relied on Section 44(3) of the *Employment Act*, which states that summary dismissal occurs when an employer terminates an employee's contract without notice or with less notice than that which the employee is entitled to under statutory or contractual terms. He further cited Section 41 of the *Employment Act*, which grants employees the right to be heard before termination on grounds of misconduct, poor performance, or incapacity. The Respondent argued that he was not given a chance to defend himself. Under Section 43 of the *Employment Act*, the employer is required to prove the reason for termination, and failure to do so renders the termination unfair under Section 45. Section 35(5) provides that an employee is entitled to service pay for each year worked if they are not registered under a pension scheme, which the Respondent was not. Section 28 of the *Employment Act* entitles employees to at least 21 working days of paid leave per year, and where employment is terminated after two or more months, the employee is entitled to compensation for accrued leave. The Respondent asserted that he was neither granted leave nor compensated for it.

7. The Respondent further relied on Section 45 of the *Employment Act*, which provides that termination is unfair if the employer fails to prove that the reason for termination was valid, fair, and conducted in accordance with fair procedure. Under Section 45(3), an employee who has been continuously employed for more than 13 months has the right to complain of unfair termination. Section 51 entitles an employee to a certificate of service upon termination unless they worked for less than four consecutive weeks. The Respondent argued that the Appellants had dismissed him in total disregard of labour laws. The Respondent also relied on the Regulation of Wages Order, 2017, which stipulates the basic salary, hourly pay, and daily wage for a driver of a small vehicle as Kshs. 17,447, Kshs. 15,834.40, and Kshs. 157.00, respectively. Section 31 of the *Employment Act* entitles employees to housing or a house allowance, which was not included in the salary the Claimant received. Section 74 of the *Employment Act* mandates employers to keep records regarding contracts, leave, pay, and disciplinary actions. The Respondent contended that the burden of proof that he was paid minimum wage, house allowance, overtime, and other entitlements lay with the Respondents. Section 53 of the *Labour Institutions Act* further requires employers to keep records proving compliance with wage orders.

8. The Respondent sought several reliefs, including a declaration that his termination was unlawful, malicious, unprocedural, and an infringement of his constitutional rights. He sought maximum compensation for wrongful dismissal, including one month's salary in lieu of notice amounting to Kshs. 20,014.72, damages for wrongful dismissal amounting to Kshs. 241,251.24 (computed as Kshs. 20,104.27 multiplied by 12 months), unpaid public holidays for 2017 (6 days) amounting to Kshs. 22,615.20, for 2018 (12 days) amounting to Kshs. 26,384.40, and for 2019 (7 days) amounting to Kshs. 26,384.40. He also sought service gratuity amounting to Kshs. 23,093.00, unpaid leave amounting to Kshs. 45,035.44, overtime payment totaling Kshs. 1,085,529.60 (calculated as 32 hours per week from May 2017 to July 2019 at a rate of Kshs. 157.05 per hour), and house allowance amounting to Kshs. 69,324.39 (15% of Kshs. 17,447.15 multiplied by 27 months). The Respondent also sought interest on the total sum, a certificate of service, costs of the suit, and any other reliefs the court deemed fit and just to award.

9. The Appellants in their Statement of Defence dated 9th December 2019 denied each and every claim contained in the Claim and put the Respondent to strict proof thereof. They admitted the description of the parties as stated in paragraph 2(a), (b), and (c) of the Claim but denied having employed the Respondent, putting him to strict proof of the employment relationship. Without prejudice to this denial, they asserted that the Respondent did not work diligently as he claimed and had received several warnings before his dismissal. The Appellants listed several incidents where the Respondent's

performance and character had been found wanting, including an instance in April 2017 when the 1st Respondent lost USD 100 after leaving his wallet in the car driven by the Respondent, where no one else had access. In March 2018, the Respondent allegedly failed to report to work and instead sent someone unknown to the Appellants. He was also warned for being rude to his employer and their children. In June 2019, during a party where the Respondent was tasked with parking guests' cars, he reportedly got drunk and verbally abused his employer. At the same event, a visitor lost Kshs. 40,000 after the Respondent was given their car to park. Additionally, the Appellants stated that the Respondent had a habit of coming to work while intoxicated.

10. The Appellants asserted that the employment contract signed between the 2nd Appellant and the Respondnet provided for a salary of Kshs. 18,000, which was all-inclusive, and therefore the Respondent's claims for additional allowances were dishonest and unfounded. They maintained that whenever the Respondent worked overtime or on a public holiday, he was duly compensated. They further stated that the Respondent had been warned multiple times and was given an opportunity to defend himself, but he chose not to do so. They contended that the Respondent was paid all his dues, including his final salary for July 2019, and that they did not owe him anything further. The Appellants argued that the claim against them was an afterthought, unfounded, and bad in law, urging the court to dismiss it with costs.

Appellants Submissions

11. The Appellants filed written submissions dated 2nd September 2024, arising from the decision of the Lower Court in CMEL 1627 of 2019. They stated that the Respondent's claim was as set out in the Memorandum of Claim filed on 9th September 2019, contained in pages 4-14 of the Record of Appeal. The Respondents had filed a Defence disputing the claim, and after a full hearing, judgment was entered in favour of the Claimant for the sum of Kshs. 1,085,529, along with costs and interest, as reflected in the decree at page 73 of the Record of Appeal. The Appellants contended that they had filed a comprehensive Defence listing instances where the Claimant had been warned and reprimanded for misconduct. They also asserted that there was a written contract of employment that clearly stated the terms of employment. They referred to paragraph 3(a) of the Statement of Claim, where the Claimant stated that he was employed from May 2017 until his dismissal in July 2019, amounting to approximately 26 months of employment. The Appellants argued that the Lower Court erred in awarding Kshs. 1,085,529.60 as overtime pay without providing an explanation of how the amount was calculated. While acknowledging their legal obligation to keep employment records, they asserted that the court also had a duty to demonstrate how it arrived at the awarded figure. They further disputed the court's statement that they had not resisted the claim for overtime, pointing out that paragraphs 6, 7, and 8 of their Defence explicitly denied the claim.

12. The Appellants further argued that damages were not awardable in cases of this nature and that a successful litigant is only entitled to what they would have been paid if the dismissal had not occurred. They contended that the court erred in awarding Kshs. 54,958 under this heading. They also disputed the Respondent's claim that he worked an additional 32 hours per week, arguing that as a driver primarily responsible for taking children to school, it was improbable that he could have accumulated such overtime. They stated that the award was made without sufficient scrutiny. Additionally, they argued that the Respondents had, at one point, been away for five months, during which time the Claimant was not reporting for duty. They asserted that these 150 days should have been sufficient to compensate the Claimant for any alleged overtime or public holiday work.

13. The Appellants maintained that the Claimant had been repeatedly warned during his employment and was ultimately dismissed due to his conduct. They referred to document number 42 in the Record

of Appeal, which contained a warning letter issued to the Claimant. They also stated that the Claimant had been paid up to July 2019, as evidenced by document number 45 in the Record of Appeal, and argued that it was incorrect for the Lower Court to award an unpaid salary that did not exist. They further stated that, pursuant to warrants of attachment issued by the Lower Court, their motor vehicle, Registration No. Kxx 9xxV, valued at over Kshs. 500,000, had been attached and sold, with the proceeds used to satisfy the decretal sum. They urged the court to find that the amount realized from the auction was sufficient compensation for the Claimant.

14. The Appellants relied on the case of John Rioba Maugo v Riley Falcon Security Services Ltd, ELRC Cause No. 7 of 2015, Kisumu, where Justice Maureen Onyango held that an employee who becomes intoxicated during working hours renders themselves unwilling or incapable of performing their duties properly. They also cited Section 44(4)(b) of the *Employment Act*, which provides intoxication as a ground for summary dismissal. They urged the court to find that the dismissal was lawful and within the permissible reasons under the law, and thus allow the appeal. They further submitted that if the court found the Claimant entitled to any payment, it should consider that the amount realized from the sale of motor vehicle Registration No. Kxx 9xxV was sufficient compensation. They prayed for the appeal to be allowed.

Respondent's Submissions

15. The Respondent filed written submissions dated 22nd January 2025, asserting that parties are bound by their pleadings and that issues formed after the pleadings were closed directly impacted the judgment of the trial court. They contended that the Appellants' pleadings, testimony, and submissions did not warrant interference with the trial court's findings and that the appeal lacked merit and should be dismissed with costs awarded to the Respondent. In reference to the Appellants' submissions dated 2nd September 2024, the Respondent pointed out that the Appellants had asserted the existence of a written employment contract. However, during cross-examination, the Claimant stated that he had no letter of appointment. The Respondent objected to the Appellants' attempt to introduce fresh documents such as a letter of appointment and payslips, arguing that the law on fresh evidence is well-settled and that no proceedings had allowed their introduction. The Respondent further highlighted that the Appellants, through their advocate, falsely claimed in their submissions that the Claimant had been absent for five months and that this should have been sufficient to compensate for any overtime or public holiday work. The Respondent argued that this assertion was not raised at trial and was an attempt to mislead the court. They also dismissed the Appellants' claim that their motor vehicle, Registration No. Kxx 9xxV, had been attached and sold to satisfy the decretal sum, stating that this argument was introduced after the trial court had become *functus officio* and could not be a valid ground for appeal.

16. The Respondent referred to their Memorandum of Claim dated 6th September 2019, which outlined clear computations regarding overtime pay. They argued that while the Appellants claimed that the awarded overtime was unsubstantiated, the claim had been particularized as 84 hours minus 52 hours, resulting in 32 overtime hours per week, which the court allowed as prayed, with no objection from the Appellants during trial. The sworn statement further provided a comprehensive account of the Claimant's working hours, termination circumstances, and employment conditions, none of which were rebutted. The pleadings also included the termination letter and other documents that were largely uncontested. The Respondent pointed out that the Appellants' statement of Defence dated 9th December 2019 showed that they had acknowledged the Claimant's employment but chose to contest specific claims. They noted that the Appellants had asserted that the Claimant was paid for overtime and public holidays but failed to provide any evidence to support this claim. The Respondent further argued that the Appellants' witness statement did not dispute the claims apart from termination and

failed to demonstrate procedural fairness or the merits of the decision. The list of documents dated 23rd March 2021 submitted by the Appellants contained only a warning letter, a termination letter, and a salary acknowledgment receipt, but no employment contract, contradicting their claim of its existence.

17. The Respondent submitted that Ground 1 of the appeal, which challenged the trial court's finding that the Claimant was employed by the Appellants, was not an issue at trial as the Appellants had acknowledged the employment relationship. Ground 2, which questioned whether the Claimant was employed by both Appellants, was also not an issue at trial and was not argued in the submissions. Ground 3 regarding wrongful termination was not adequately addressed by the Appellants, as they focused on contesting damages rather than disputing the unfair termination finding. Ground 4, which argued that there was no evidence that the Claimant worked during public holidays, was countered by the Respondent, who noted that the Appellants had acknowledged in paragraph 6 of their Defence that the Claimant was paid for overtime and public holidays but failed to provide supporting evidence. Ground 5 on annual leave appeared to have been abandoned, while Ground 6 was irrelevant since the claim did not seek unpaid salary. Grounds 7 and 8 regarding overtime were addressed together, with the Respondent emphasizing that the Appellants had not contested the claim at trial. Ground 9 challenging damages was dismissed as misplaced since the *Employment Act*, Section 49(1)(c) explicitly allows for damages of up to twelve months' gross salary in cases of wrongful dismissal. Ground 10 was unclear, and the Respondent stated that the Appellants' submissions did not provide clarity on the argument or foundation of the ground.

18. The Respondent argued that the question of wrongful termination was assessed based on procedural fairness and merit. The trial court had found that no notice to show cause was issued and no disciplinary hearing was conducted before the Claimant's termination. The Appellants did not challenge the finding of unfair termination but instead focused on contesting the damages awarded. The Respondent referred to Section 49 of the *Employment Act,* which allows for compensation of up to twelve months' salary in cases of unjustified termination, and submitted that the award was legally sound. They further contended that the Appellants had failed to provide evidence to dispute the Claimant's claims regarding public holiday pay, and the court was justified in awarding compensation under this head. They noted that the Appellants remained silent on this issue at trial and failed to produce employment records, thereby conceding to the Claimant's claims. The Respondent asserted that there was no material before the appellate court to overturn the trial court's finding.

19. On the issue of overtime, the Respondent referred to the trial court's finding that Section 10(6) and 10(7) of the *Employment Act* placed the burden on the employer to keep employment records and that since the Appellants had not challenged the overtime claim at trial, it was rightly awarded. The Respondent noted that the calculations were clear, and the Appellants had not raised any objections regarding time limitations. They also highlighted Section 48(1)(a) and (b) of the *Labour Institutions Act* and Section 27 of the *Employment Act*, read together with Paragraph 7 of the Regulation of Wages Order, which supported the Claimant's entitlement to the awarded amounts. Regarding Ground 10, the Respondent found the argument unclear and submitted that the calculations were done in accordance with the law. They noted that the Appellants had not challenged the computations at trial and could not raise the issue at this stage. They further argued that costs follow the event and requested the court to award the Claimant costs of the appeal, maintaining the costs and interest awarded by the trial court. In conclusion, the Respondent submitted that the appeal lacked merit and should be dismissed with costs.

20. I have examined the averments and submissions of the parties herein. This being a 1st appeal to this court, this court is obligated to re-evaluate the evidence afresh and reach a determination.

21. From the evidence on record, the respondent was an employee of the appellant. This can be discerned from the fact that the 1st appellant vide a letter of 16/7/2017 wrote to the respondents claimant as follows:

> Johannes Assen
>
> Nairobi
>
> 16 July, 2019
>
> Julius Amayi Khamunywa
>
> Nairobi
>
> Julius,
>
> After some time left to contemplate the future we choose to follow with you we have finally decided that our working relationship can no longer be sustained due to the following reasons:
>
> 1. The several encounters we have had with you in the past that have caused you to be warned and reprimanded.
> 2. Excessive drunkenness and disorderly behaviour while at work.
> 3. Two accounts of money loss:
>   a) $100 when you started the job.
>   b) 40,000/- while on the job and the only active driver of the visitors cars at our home.
> 4. The lack of transparency and lies that have transpired throughout your time on the job.
> 5. Blatant lack of respect of your employer.
>
> Bearing all this in mind, we deeply regret to inform you that we are no longer in need of your services as your values no longer match ours.
>
> We wish you the best in your endeavour.
>
> Yours faithfully,
>
> Johannes Assen

22. The letter was indeed a termination letter and you cannot terminate one who is not in your employment. The letter was penned off by the 1st appellant and he was thereafter paid some dues as per the note of 31/1/2019.

23. In their submission before the lower court, the respondents jointly submitted that they had employed the claimant and that he was dismissed in July 2019 having worked for them for 2 years only.

24. They indicated that he was dismissed after being given several warnings due to drunkenness, theft, rudeness, absenteeism and lateness. The submissions that the claimant was not in their employment is therefore unmerited and is therefore disregarded.

25. From the letter to the respondent by the said appellants they then informed him that he had been terminated on that day for excessive drunkenness and disorderly behaviour at work, theft, lack of

transparency and lies among other reasons. There is no indication that the respondent was subjected to any disciplinary hearing before the dismissal as provided for under section 41 of the *Employment Act* which provides as follows:

> 41.(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

26. Based on these facts, the trial court was able to find that the respondent had been unfairly terminated by the appellant. Indeed, under section 45(2) of the *Employment Act* 2007, any termination not backed with a fair disciplinary hearing and establishing of valid reason is an unfair dismissal and it is my finding that the determination by the trial magistrate that the termination of the respondent was unfair was merited.

27. As concern remedies awarded to the claimant respondent which the appellants have submitted were not warranted from the record, the respondent was being paid kshs 18,000/-.The analysis by the trial court show that the respondent was underpaid his wages as per the regulation of Wages (General) Amendment order 2018 as he was to be paid kshs 18,319.50. He was therefore underpaid by kshs 319.50 every month and in February 2019 he was underpaid by kshs 1319.50/-.

28. There is no evidence that he was paid during the holidays as had been admitted by the appellant's witness (RW1). Based on all these findings, the trial court awarded the respondent 1-month pay in lieu of notice – Kshs 18,319.50 damages amongst other remedies.

29. I find that the remedies were based on sound legal reasoning and I find no reason to vary them. I therefore affirm the trial Court's findings and dismiss this appeal accordingly with costs to the respondents for both the lower Court and for this Court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2025.

HELLEN WASILWA

JUDGE