



Karogo v Mwangi t/a Agape Growers Limited (Employment and Labour Relations Appeal E217 of 2023) [2025] KEELRC 1022 (KLR) (28 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 1022 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E217 OF 2023**

**JW KELI, J
MARCH 28, 2025**

BETWEEN

JAMES NDUATI KAROGO APPELLANT

AND

**JOSEPHAT NJOROGE MWANGI T/A AGAPE GROWERS
LIMITED RESPONDENT**

(Being an Appeal from the Judgment of the Honourable S.A Opande (PM) delivered at Nairobi on the 29th September, 2023 in Nairobi Employment Cause No. E1008 of 2020)

JUDGMENT

1. The Appellant, dissatisfied with the Judgment of the Honourable S.A Opande (PM) delivered at Nairobi on the 29th September, 2023 in Nairobi Milimani Commercial Courts Employment Cause No. E1008 of 2020 between the parties filed a Memorandum of Appeal dated 29th July, 2024 seeking the following Orders:
 - a. That the Appellant’s Appeal be allowed.
 - b. That the judgment delivered virtually by Honourable S.A Opande (PM) on 29th September, 2023 in the Chief Magistrate’s Court at Milimani Commercial Courts, Nairobi, MCELRC No. E1008 of 2020 be set aside in terms of all the prayers of the Statement of Claim and be substituted with Judgment in favour of the Appellant in terms of the prayers cited herein.
 - c. That the Appellant be awarded costs of this Appeal and in the Trial Court.
 - d. Such other or further relief orders and/or remedies as the Honourable Court may deem just and expedient.



The Grounds of the Appeal

2. The Trial Magistrate erred in law and in fact in failing to appreciate the proper effect and purport of the evidence and in arriving at a decision which is not supported by or is against the weight of the evidence.
3. The Trial Magistrate erred in law and in fact in failing to consider or adequately consider the Appellant's testimony that the Appellant had been in the Employment of the Respondent for a continuous period of 13 years without a break and service gratuity was due and payable to the Appellant.
4. The Trial Magistrate erred in law and in fact in failing by not appreciating the evidence of the Appellant that the Appellant had never proceeded on leave for the entire period of his employment with the Respondent for 13 years and the Appellant worked for overtime and during public holidays without compensation.
5. The Trial Magistrate erred in law and in fact by not appreciating the evidence of the Appellant on the date of the termination of the Appellant's employment by the Respondent and especially upon the demand by the Respondent on the calculation of the Appellant's terminal benefits for settlement.
6. The Trial Magistrate erred in law and in fact by arriving at an erroneous finding that the Appellant had admitted abdicating work contrary to the Appellant's evidence as adduced in court.
7. The Trial Magistrate erred in law and in fact in failing by not appreciating the evidence on record and submissions of the Counsel for the Appellant by not awarding any compensation for unfair termination of the Appellant's employment.
8. In all the circumstances of the case, the findings of the Learned Trial Magistrate are at variant with the weight of the evidence adduced and therefore, failing to make any and/or adequate award in favour of the Appellant.

Background of Appeal

9. The Claimant/Appellant filed a claim against the Respondent vide a Statement of Claim dated 16th October, 2020 seeking the following Orders:-
 - a. Service gratuity for a period of 13 years calculated at Ksh. 260,000/=
 - b. Payment in lieu of Notice Kshs. 20,000/=
 - c. Payment in lieu of leave Kshs. 260,000/=
 - d. Payment for overtime worked and not paid Kshs. 3,165,864/=
 - e. Payment for public holidays worked and not paid Kshs. 156,078/=
 - f. Payment for Sundays worked and not paid Kshs. 901,784/=
 - g. Payment for compensation for unfair termination Kshs. 240,000/=Total amount claimed Kshs. 5,003,726/=
- h. Damages for pain and suffering as may be determined by this Honourable court.
- i. Certificate of service
- j. Costs of this suit with interest



- k. Any other orders and/or relief that this Honourable court may deem just and expedient to grant.
10. The Claimant filed his verifying affidavit, Witness statement and list and bundle of documents all of even date (see pages 7-69 of ROA).
 11. The claim was opposed by the Respondent who entered appearance and filed a Respondents' Defence and Counterclaim dated 11th December, 2020 (Pages 74-81 of ROA), Respondent's Verifying Affidavit, list of witnesses, Respondent's Witness Statement and list and bundle of documents dated 21st September, 2021 (Pages 83-113 of ROA).
 12. The Respondent's Counterclaim sought the following reliefs:
 - a. A declaration that the Claimant was never unlawfully dismissed as he alleges in his said statement of claim
 - b. A declaration that the Claimant breached implied terms of the contract that he would serve the Respondent with fidelity as the Claimant ran a motorbike business, converted monies and items from the Respondent's building and absconded duty on 24th July, 2020
 - c. A declaration that he is obliged to account to the Respondent for the revenue he obtained while in the course of rendering caretaker services because he ran his business during working time and other monies collected from tenants of the Respondent.
 - d. An order that the Claimant accounts to the Respondent and thereafter, pays him the money he converted to his personal use:
 - i. Benefits he derived from operating the motorbike business during his employment with the Respondent;
 - ii. Rent collected from letting a store on the suit premises which she used to house her produce as she operated the small kiosk attached to the suit premises.
 - iii. Kshs. 5,000/= per month payment for night watchman of the property
 - iv. Kshs. 10,000/= unlawfully charged to illegal tenants from vacated premises and newly incoming tenants without knowledge of the Respondent and continue with old tenancy agreements without the knowledge of the landlord;
 - v. Kshs. 1,000/= charged to tenants who did not move out following issuance of notices to vacate;
 - vi. Revenue obtained during the pendency of carrying out of motorbike business;
 - vii. During the employment, the Claimant committed acts of fraud by collecting illegal fees and commissions whilst working as a caretaker for the Respondent
 - e. An order that the Claimant refunds the Respondent Kshs. 650/= for replacement of post office keys held by the Claimant and Kshs. 2,000,000/= being the value of the missing items taken from LR No. 36/VII/135 when the Claimant absconded from his duty
 - f. Costs of suit and counterclaim
 - g. Interest at court rates on d), e) and f) above at court rates
 - h. Any other relief that this Honourable Court may deem fit to grant.



13. The Claimant subsequently filed the Claimant's Statement of Reply to Respondent's Defence and Counterclaim dated 12th February, 2021(Pages 114-118 of ROA).
14. The Respondent subsequently filed four other witness statements dated 6th November, 2021 together with its Supplementary List of documents dated 24th January, 2022 (pages 120-130 of ROA).
15. The Claimant filed further witness statement of the Claimant and of Stephen Irungu Mwangi all dated 28th April, 2022(pages 131-133 of ROA).
16. The claimant's case was heard on the 28th July, 2022 and further on the 2nd September, 2022 and 7th October, 2022 where the claimant and Mr. Stephen Irungu Mwangi testified in the case, they produced their documents and were cross-examined by Counsel for the Respondent, Dr. Kamau Kuria (see pages 394-407 of ROA)
17. The Respondent's case was heard on 2nd December, 2022, 17 February, 2023 where the Respondent's witnesses Mr. Boniface Maina, Wilson Kangethe Mucheru, Raphael Kamau and Josephat Njoroge Mwangi testified on behalf of the Respondent and were cross-examined by counsel for the Claimant, Mr. Ashioma(pages 409-423 of ROA).
18. The parties took directions on filing of written submissions after the hearing. The parties complied.
19. The Trial Magistrate Court delivered Judgment on the 29th September, 2023 holding that the Statement of Claim dated 16th October, 2020 succeeds only in terms of the prayer seeking a Certificate of service and that the Counterclaim dated 11th December, 2020 is hereby dismissed and each party to bear their own costs. (Judgment at pages 381-390 of ROA).

Determination

20. The appeal was canvassed by way of written submissions. Both parties complied.
21. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123 that:- "The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 allowance in this respect. In particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."
11. The court is further guided by the principles on appeal decisions in *Mbogo v Shah* [1968] EA De Lestang V.P (as he then was) observation at page 94: "I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

Issues for determination

22. The Appellant and the Respondent submitted on the grounds of appeal as their issues for determination.



23. The court was of the opinion that the issues for determination in the appeal were:-
- a. Whether employment of the appellant was terminated.
 - b. Whether if terminated the termination was unfair and unlawful.
 - c. Whether the appellant was entitled to the reliefs sought in the claim.

Whether employment of the appellant was terminated

24. The claimant's case was that on the 16th July 2020 he was verbally informed by the respondent that his services were no longer needed and the respondent asked the claimant to calculate his terminal benefits for settlement (paragraph 10 of the claim at page 7 of RoA). At paragraph 13 of his witness statement the claimant stated that on the 23rd July 2020 at 2.24pm the respondent's wife sent to his Mpesa Kshs. 20000 and the Respondent telephoned him to inform the money was meant for his moving out of the respondent's premises as he had terminated the services.
25. The respondent in his witness statement at paragraph 12 stated that on the 16th July 2020 the claimant informed him that he had managed to secure alternative accommodation at the Nairobi City houses at the nearby California estate and would need to move his family to the new house. The respondent stated that on the 23rd July 2020 he arranged for the claimant to receive his July salary to facilitate his movement to the new house and new deployment. At page 95 was the letter of deployment dated 23rd July 2020 which the respondent stated he sent to the claimant. That the son called the claimant to collect the letter but the claimant informed the son he was not available so the son dropped the letter with the claimant's relative to arrange for her to give it to the claimant. The respondent asserted that the claimant absconded work.

Decision.

26. Josephat Njoroge Mwangi (the employer) told the trial court that Claimant started working in 2008 and left 2020. During cross-examination the Respondent denied having terminated the employment of the claimant. That the claimant ought to be in employment but absconded. That he wrote to the claimant several letters but he never responded. That he served the letter dated 23rd July 2020 on the claimant but he was not available. That the letter was received by a relative whose number and name he did not get. He sent the letter to the claimant via WhatsApp.
27. During cross-examination, the claimant told the trial court he worked until 24th August 2020. He told the court what he had stated was true. It is then recorded the claimant told the court he abdicated work on 24th August 2020. (page 395 of RoA). The claimant further told the court that it was not true he was deployed. He had no WhatsApp on his phone. The cross-examination continued at page 398 (of RoA). The claimant told the trial court on the 23rd July 2020 he was told the job was terminated. He received Kshs. 20000 via Mpesa. He never received the deployment letter.
28. Reading through evidence in chief, and cross-examination, the court finds that the Claimant was emphatic he never received the deployment letter (page 398, 402 of RoA). During cross-examination claimant said he was called and told the work was over. He denied deployment (page 404 of RoA). The court found the isolated statement of 'I abdicated work' (page 395 of RoA) was contrary to the claimant's entire evidence at cross-examination. The court found it was more probable than not the evidence was not captured correctly or the claimant did not understand what it meant to abdicate. Indeed after the statement, the claimant on continued cross-examination was emphatic that he was informed his job was terminated and he denied receipt of the deployment letter. At page 398 the Claimant stated he does not have WhatsApp phone and reiterated he never received the deployment



letter. At page 399 the Claimant stated he was sacked on 23rd July 2020 and told to move out. At page 402 the claimant told the court that he was terminated and not deployed. At re-examination the claimant told the court he was called and told the work was over and was not told about the deployment (page 404 of RoA). The purpose of re-examination is to clarify issues arising from cross-examination. The court finds the finding by the trial court of Claimant having admitted to abdication of work was not supported by his witness statement, examination in chief, cross-examination and re-examination. The finding of absconding by the Trial court was based on misapprehension of facts and evidence. The alleged relative who was given the deployment letter was not disclosed. Further the Respondent said he sent the letter by Whatsapp but the same was not evidence before court. The Claimant denied having Whatsapp. On re-evaluation of the evidence before the trial court, the find finds that the Appellant's employment was terminated by the respondent.

Whether, if terminated the termination was unfair and unlawful

29. The threshold for fair termination of employment against which the Court determines claims for unfair termination is according to the provision of section 45(2) of the Employment Act to wit:-⁹45. Unfair termination

- (1) No employer shall terminate the employment of an employee unfairly.
- (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

30. Fairness as per section 45(2) (supra) has two components,

- (a) substantive fairness of valid reasons related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and
- (b) procedural fairness under section 41 of the Employment Act.

25. The evidence was as per the re- evaluation under issue 1. The trial court found the appellant abdicated work contrary to evidence before the court. The court having found the appellant's work was terminated the question then was whether the termination was fair. There was no hearing according to section 41 of the Employment Act and no valid reason was proved for the termination according to section 43 of the Employment Act. The court holds the termination was unlawful and unfair.

Whether the appellant was entitled to the reliefs sought in the claim.

31. The Respondent told the trial court that the Claimant never raised claim of untaken leave. No issue of overtime as he worked without supervision. No alleged pay for public holiday. On prayers sought, on basis of nature of work held by the appellant of unsupervised caretaker, the court found no basis to interfere with the finding on overtime and public pay which ought to be proved strictly. (Court of Appeal in Ngunda v Ready Consultancy Limited(2022)e KLR)



32. On annual leave, this is a statutory right. The Respondent told the court the claimant never asked for leave. The Claimant did not place before court evidence of having asked for leave, and it was not granted. Section 28 of the Employment Act provides for annual statutory leave as follows:- ‘28. Annual leave

- (1) An employee shall be entitled—
 - (a) after every twelve consecutive months of service with his employer to not less than twenty one working days of leave with full pay;
 - (b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave-earning period, to not less than one and threequarter days of leave with full pay, in respect of each completed month of service in that period, to be taken consecutively.
- (2) An employer may, with the consent of the employee divide the minimum annual leave entitlement under sub-section (1)(a) into different parts to be taken at different intervals.
- (3) Unless otherwise provided in an agreement between an employee and an employer or in a collective agreement, and on condition that the length of service of an employee during any leave earning period specified in subsection (1)(a) entitles the employee to such a period, one part of the parts agreed upon under subsection (2) shall consist of at least two uninterrupted working weeks.
- (4) The uninterrupted part of the annual leave with pay referred to in subsection (3) shall be granted and taken during the twelve consecutive months of service referred to in subsection (1) (a) and the remainder of the annual leave with pay shall be taken not later than eighteen months from the end of the leave earning period referred to in subsection (1)(a) being the period in respect of which the leave entitlement arose” The appellant did not demonstrate that he asked for annual leave and was denied. Untaken leave is granted for 18 months only under section 28(4) of the Employment Act.

33. Service pay- Where an employee does not enjoy any social security in terms of pension service pay is applicable. The claimant had no pension or NSSF , under section 35(5) of the Employment Act the employee would be entitled to service pay at 15 days for each completed year of service. The law states:-

‘35

- (5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.
- (6) This section shall not apply where an employee is a member of—
 - (a) a registered pension or provident fund scheme under the Retirement Benefits Act;
 - (b) a gratuity or service pay scheme established under a collective agreement;
 - (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and



(d) the National Social Security Fund.” The appellant did not have pension or NSSF and was thus entitled to serve pay for the 12 years (2008 – 2020) worked at 15 days for each completed year of service. Thus KShs.120,000.

34. Notice pay- The appellant was not issued with a notice before termination of his 12 years employment. section 35 (1)(c) provides for notice of a monthly employee as follows:- ‘where the contract is to pay wages or salary periodically at intervals of or exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of notice in writing.’. The court finds that the appellant was entitled to one month notice in lieu under section 35 of *Employment Act* for lack of notice of termination. Notice pay of Kshs. 20000 is awarded.
35. Compensation for unfair termination. The Appellant had worked diligently for the respondent for 12 years. The employment was terminated without fairness. The Respondent relied on the decision of Court of Appeal in *Kenya Broadcasting Corporation v Geoffrey Wakio (2019)e KLR* to the effect that damages payable to the employee for unfair termination is equivalent of salary in lieu of notice. The Supreme Court in *Ken freight (E.A) Limited v Benson K. Nguti SC Pet. No. 37 of 2018 [2019] eKLR* explained the applicability of the provisions of Section 49 of the *Employment Act* as hereunder;

“....What then should be the correct award on damages be based on? Having keenly perused the provisions of Section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a Court of law, and where a Court found the same to be unfair or wrongful, Section 49 applies....” The remedies under section 49 include notice pay and compensation as follows:- ‘49. Remedies for wrongful dismissal and unfair termination

- (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
 - (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.” Consequently, the court on appeal having found unfair termination grants compensation to the Appellant equivalent of the 10 months



salary taking into account that the appellant was already in meaningful engagement at the hearing and has been awarded service pay. Compensation for unfair termination is awarded at appeal for KShs. 200,000

Conclusion

36. The appeal is allowed. The Judgment of Hon. S.A Opande delivered on the 29th September 2023 in MCELRC No. E01008 of 2020 is set aside and substituted as follows:-

Judgment is entered for the claimant against the Respondent as follows:

- a. Notice pay of - KShs. 20,000
- b. Compensation of equivalent of 10 months' salary - KShs.200,000
- c. Leave pay (18) months - Kshs. 21,000
- d. Service pay @ 15 days for 12 years work (2008 – 2020) - KShs.120,000
- e. Total - KShs.361,000/=

Certificate of service

Cost and Interest at court rates from judgment date.

37. The appellant is awarded costs of the appeal.

38. Stay of 30 days granted.

39. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF MARCH, 2025.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Appellant : -Ashiruma

Respondent: Mwenda h/b Dr. Kamau Kuria

