



REPUBLIC OF KENYA



**Ferrotech Industries Limited v Myombo (Appeal E210 of 2024)
[2025] KEELRC 979 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 979 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E210 OF 2024
M MBARÚ, J
MARCH 27, 2025**

BETWEEN

FERROTECH INDUSTRIES LIMITED APPELLANT

AND

SAMSON JUMAA MYOMBO RESPONDENT

*(Being an appeal from the judgment of Hon. R. N. Akee delivered
on 30 September 2024 in Mombasa CMELRC No. E485 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 30 September 2024 in Mombasa CMELRC No. E485 of 2022. The appellant is seeking that the judgment be set aside.
2. The appeal is on the sole ground that the learned magistrate erred in law and fact in holding that the respondent was unfairly terminated in his employment. This was contrary to the law, the evidence and the award of 12 months in compensation was not justified.
3. The background of the suit is that on 1st June 2014, the appellant employed the respondent as a machine tool operator in Mombasa. His monthly wage was Ksh.8, 000 below the minimum wage. He worked until 30 June 2020, when his employment was terminated without notice. He reported to work, and Osman, the manager, told him to hand over his tools and go home without any reason. The same manager also terminated he employment of other employees. The respondent claimed the following terminal dues;
 - a. Notice pay Ksh.8,000;
 - b. House allowance for 70 months Ksh.84,000;
 - c. Unpaid leave for 5 years Ksh.92,431.50;



- d. Underpayments for 70 months Ksh.722,365;
 - e. 12 months' compensation Ksh.96,000;
 - f. Unpaid overtime of one hour per day for 70 months Ksh.346,290;
 - g. Unpaid NHIF for 70 months Ksh.35,000;
 - h. Service pay for 5 years Ksh.20,000;
 - i. Costs of the suit.
4. The appellant's case was that the respondent was employed as a general labourer following his employment application. He was issued with a fixed term contract as follows;
- a. 3 September 2019 to 3 October 2019;
 - b. 14 October 2019 to 4 January 2020;
 - c. 6 January 2020 to 6 April 2020.
5. The wage paid was Ksh.7, 241 and a house allowance of Ksh.1, 086 gross Ksh. 8,327 as provided under the Wage Orders as a consolidated pay. Employment commenced in September 2019 and not in 2014 as alleged. The respondent worked under his fixed-term contracts until 4 February 2020 when he voluntarily resigned on personal grounds. The contracts provided for annual leave which was taken and the wage paid was inclusive of house allowance. At the time of his resignation, the respondent was paid all his wages until 4 February 2020.
6. The learned magistrate heard the parties and in judgment held that the appellant placed the respondent under intolerable working conditions leading to resignation which was constructive dismissal. There was unfair termination of employment and hence the following awards;
- i. Other prayers are awarded as in the face of the claim except for unpaid overtime, house allowances and service pay which hasn't been proved.
 - ii. Compensation for unlawful and unfair termination of employment.
- ...
- I proceed to award 12 months' salary as compensation for unprocedural termination at Ksh.96, 000.
7. The appellant submitted that on the single award of 12 months' compensation, there was no evidence submitted by the respondent that there was no voluntary resignation. Under the fixed-term contract, he had the option to terminate his employment. The appellant called evidence and proved that the respondent took his accrued leave days and those not taken were encashed and he executed a discharge voucher. The respondent was based in Mazaras and not Mombasa as alleged and the wage paid was per the Wage Orders hence no underpayment. The award of compensation was in error given the evidence of voluntary resignation.
- The respondent did not file any written submissions.
8. This being a first appeal, the court is allowed to review the record re-assess the findings and make its conclusions. However, take into account that the trial court had the opportunity to hear the witnesses give evidence.



9. The respondent testified before the trial court on 21 November 2023 that he had no written contract and did not sign any with the appellant. He was working at Mazeras and worked from 2014 to 30 March 2020 when he was dismissed. His wage was ksh.8, 327 per month and had pay slips issued.
10. The appellant filed a response to the respondent's claim on 9 September 2022. Attached to the response was a letter dated 3 September 2019 by the respondent applying for employment with the appellant. There is a fixed term contract from 1 September 2019 to 3 October 2019, and the respondent is defined as a general labourer. There is a aContract dated 4 October 2019 for 3 months. A Contract dated 6 January 2020 for 3 months.
These contracts were not challenged before the hearing.
12. There is a letter dated 4 February 2020, a resignation from employment due to personal reasons.
The authenticity of this letter is not challenged.
13. An employee is allowed to terminate their employment for personal reasons. Where such arises from intolerable working conditions, the employee must plead constructive dismissal as held in *Salihya Company Limited v Ouma & another* [2025] KECA 310 (KLR). The concept of constructive dismissal is not addressed under the *Employment Act* and hence, to be inferred, the party seeking to rely on such matter must plead to allow the respondent to address. Constructive dismissal cannot be inferred by the court outside the pleadings before it. In *Ongera v Gianchore Tea Factory Co. Limited* [2025] KECA 88 (KLR) the court held that it is not enough for an employee to claim that they were terminated constructively or unfairly, they must place tangible evidence and material before the court in support of their case and prove their claim on a balance of probabilities.
14. In this case, the court finds no matter of constructive dismissal. The respondent terminated his employment by resignation. Through a notice dated 4 February 2020, he gave personal reasons for the termination of employment. Such is a sufficient and justified cause. The finding that there was an unlawful and unfair termination of employment was in error.
No notice pay or compensation is due.
15. On the claims for house allowances for 70 months, under the fixed-term contracts, the parties agreed on the basic wage and a house allowance. A consolidated gross wage was paid at Ksh.8, 327 which was admitted by the respondent.
16. A general worker in Mazeras is placed under Other Areas in the Wage Orders. In January 2020, such an employee had a basic wage of Ksh.7, 240 whereas the respondent was paid Ksh.7, 241 and the due house allowance of Ksh.1, 086 which is appropriate.
17. There was no underpayment or a house allowance due beyond the wages paid.
18. The witness called by the appellant testified to the fact that the respondent's leave days under his fixed-term contract were encashed. The petty cash voucher dated 4 February 2020 includes payment for 4.75 days.
19. On the claim for overtime pay, there were no particulars in the Memorandum of Claim on how this accrued. There are no details of the working hours beyond what was provided under the fixed-term contract.
20. The NHIF dues claimed are a statutory payment to the statutory body and not to the employee. The alternative claim for service pay should only arise when the employer fails to remit statutory dues. The appellant attached evidence that the respondent was registered with NSSF. There is a PIN Certificate



with the Kenya Revenue Authority, and with that registration, the employer is required to submit the due returns. On this basis, service pay is not due.

These claims were correctly dismissed by the trial court.

21. As analyzed above, the award of compensation challenged in this appeal was in error. The appeal is with merit and is hereby allowed with costs. There were no costs awarded in the lower court. Such shall suffice.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 27 MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

