



REPUBLIC OF KENYA



**Onago v Ufanisi Freighters (K) Limited (Appeal E212 of 2024)
[2025] KEELRC 993 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 993 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E212 OF 2024
M MBARÚ, J
MARCH 27, 2025**

BETWEEN

ENOCK ALOO ONAGO APPELLANT

AND

UFANISI FREIGHTERS (K) LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. Nyariki delivered
on 12 September 2024 in Mombasa CMELRC No. E491 of 2022)*

JUDGMENT

1. The appeal arises from the judgment delivered on 12 September 2024 in Mombasa CMELRC No. E491 of 2022. The appellant is seeking that the judgment be set aside with costs.
2. The appeal is that the trial court's findings that employment was terminated due to desertion are in error, and the evidence presented was not considered.
3. The appellant submitted that he was employed by the respondent on 13 March 2019 as a heavy commercial driver under a written contract at a wage of Ksh. 33, 544 per month. He worked until 21 July 2022, when the respondent terminated his employment without justification. The termination notice was pinned on the gate stating that the appellant was out of bounds at the company premises. Termination of employment was irregular and without payment of terminal dues. He made the following claims;
 - a. Notice pay Ksh.35,221.57;
 - b. 12 months' compensation Ksh.422,657.84;
 - c. Underpayments;
 - d. Work during 32 public holidays Ksh.94,368;



- e. Unpaid leave for 49 days Ksh.66,378;
 - f. 44 Sundays worked Ksh.119,209;
 - g. 4 hours Overtime worked for 900 days Ksh.993,420;
 - h. Costs of the suit.
4. The appellant submitted that he did not abscond from duty as alleged by the respondent, but there was constructive dismissal. In the case of *Javan Kisoi Mulwa v SAA Interstate Traders (K) Ltd* [2018] eKLR, the court held that absconding from duty occurs when the employee fails to seek permission from work. There was no due process over the alleged absence from duty as held in *Owudu v Digital Sanitation Services Limited* [2024] eKLR.
 5. The appellant submitted that the respondent locked him out of the workplace without notice or a fair hearing. Following a notice pinned on the notice board by the respondent terminating employment, the appellant wrote seeking reasons for losing his employment, without a response. This led to constructive dismissal as the appellant was distressed and could not care for his family, as held in *Coca-Cola East & Central Africa Limited v Maria Kagai Ligaga* [2015] eKLR.
 6. The orders sought are justified following wrongful and unfair termination of employment.
 7. The respondent submitted that the appellant was employed as a truck driver under various short-term contracts. His consolidated wage was Ksh. 33,544, inclusive of a house allowance. His last contract was renewed for 24 months, from 1 September 2021 to 13 September 2023.
 8. On 21 July 2022, the appellant alleges that his employment was terminated, but he was still under a written contract and was not issued a termination notice. The appellant had differences with his immediate supervisor, which the respondent attempted to resolve, but the appellant was highly tempered. He was allowed to take some leave days to cool off and resume duty once the tension had reduced, but he declined. The appellant wrote to the respondent on 22 July 2022 and gave an ultimatum for his concerns to be addressed within the day. A complaint was raised with the Minister of Labour, who summoned the respondent to attend a meeting where the appellant's grievances were addressed, but he failed to participate.
 9. On 29 July 2022, the appellant was allowed to proceed on leave, and there was no termination of employment. He then filed a premature suit.
 10. The respondent submitted that there was a consolidated wage inclusive of house allowance, Ksh.33,544; hence, there was no underpayment. The respondent was under-regulated, working 8 hours daily, and any overtime work was not authorized. The appellant utilized all his leave days, as evidenced in his pay slips.
 11. In the judgment, the learned magistrate held that there was no letter terminating employment as alleged, and the appellant failed to submit a signed notice. He deserted work and, hence, dismissed the claim.
 12. As a first appeal, the court can review the record and conclude. However, the trial court had the opportunity to hear the witnesses.
 13. The appellant has submitted that there was constructive dismissal. On 21 July 2022, he found a notice pinned at the gate stating that he should not be allowed in the workplace. However, the alleged notice has not been filed.



14. The appellant filed his letter dated 22 July 2022. He wanted to know if his employment had been terminated and that;

... If yes, [termination of employment], which is okay, the company is free to tell me, and the offence that I have committed to that I know.

I also gave the company until tomorrow evening so that I know where I belong. I have other duties and need to look for another job because I have a family to feed and my parents who depend on me ...

15. The case, as stated by the appellant, is not a constructive dismissal. When he found a notice pinned on the gate and was not allowed within the workplace, he wrote a demand notice and indicated that he had other duties.

16. The respondent did not issue notice to the appellant as the employer requires him to respond to any disciplinary matter or end his employment. The alleged notice at the gate cannot justify a claim of constructive dismissal as defined in *Ongera v Gianchore Tea Factory Co. Limited* [2025] KECA 88 (KLR).

17. The response and submissions by the respondent suggested that the appellant deserted duty and reported the matter to the labour office, but he failed to attend. When he filed his suit, the appellant did not resume work, remaining absent until 25 August 2022.

18. Failure to report to work as required, even where the employer has reported the matter to the labour office, is an act of gross misconduct under Section 44 of the *Employment Act*. The employee who refused to attend work should be summoned to address the matter. Where he fails to do so, the employer is justified in issuing a notice terminating employment, as held in *Brandlife Kenya Limited v Koskei* [2025] KECA 100 (KLR). The employer must end the employment relationship by notice.

19. The appellant does not aid his case at all. Under section 45(5) of the *Employment Act*, the court must examine the employee's conduct leading to employment termination. The appellant demanded that he be allowed to attend to other duties through his notice. He cannot turn around and claim constructive dismissal, hence seeking payment of notice pay and compensation. The learned magistrate correctly applied the law and dismissed these claims.

20. On the claims for underpayments from July 2019 to January 2022, the appellant was under a term contract for the entire duration of his employment with the respondent. Each contract created a new relationship distinct from the other.

21. Under the application of section 89 of the *Employment Act*, claims for underpayments, if due to a continuing injury, can only go back to 12 months, as held in *Teacher Service Commission v Kibe* [2025] KECA 32 (KLR) that a claim under continuing injury must be addressed within 12 months from the date of cessation. In this case, claiming to be back in July 2021 is time-barred.

22. In this case, the appellant was employed as a truck driver with a Ksh.33, 544 wage under his last contract. The respondent admits this. A consolidated wage is allowed under Section 31 of the *Employment Act*, where the house allowance due is inclusive.

23. The appellant has claimed underpayment because he is a heavy commercial driver. His contract is that of a truck driver. Under the Wage Orders, the wage due and claimed is higher for heavy commercial drivers, which is not the appellant's title.

There is no underpayment.



24. On the claim for work during public holidays, under the last contract from 1 September 2021 to 13 September 2023, the appellant has set out 14 public holidays. The respondent did not challenge these claims. For the 14 days at Ksh.33, 544 wage, the appellant is entitled to Ksh.15 653.85 in compensation.
25. The respondent submitted evidence on the days taken by the appellant on the leave claim.
26. On the claim for Sundays worked, under section 27 of the *Employment Act*, an employee is entitled to a rest day each week. This need not be Sunday and can be substituted with any other day. The appellant did not contradistinguish this claim.
27. Under the fixed-term contract, hours of work were agreed upon regarding overtime. The appellant testified that his truck had mechanical problems, forcing him to spend long hours on the road. A mechanical issue is not synonymous with working overtime. Where work hours are agreed upon, any overtime work must be approved. The appellant cannot justify a claim of working overtime for 4 hours each day for the entire duration of his employment. These claims are exaggerated.
28. Accordingly, the appeal is without merit save for the award of work during public holidays at Ksh.15, 653.85. Each party bears its costs.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant:

..... and

