



**Aron v Bokhol Transporters Limited (Appeal E185 of 2024)
[2025] KEELRC 805 (KLR) (13 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 805 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E185 OF 2024
M MBARÚ, J
MARCH 13, 2025**

BETWEEN

WILSON ARON APPELLANT

AND

BOKHOL TRANSPORTERS LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. G. Sogomo delivered
on 2 August 2024 in Mombasa CMELRC No.E516 of 2024)*

JUDGMENT

1. The appeal arises from the judgment delivered on 2 August 2024 in Mombasa CMELRC No.E516 of 2024. The appellant seeks that the judgment be set aside and substituted with an order allowing his claim with costs.
2. The appeal is that the trial court erred in dismissing the appellant’s case, where he was required to prove his case beyond reasonable doubt instead of relying on a balance of probabilities. The trial court disregarded his evidence, made wrong conclusions, and failed to address his claim for;
 - a. Underpayments;
 - b. Unpaid leave days;
 - c. Unpaid off days;
 - d. Unpaid public holidays;
 - e. Unpaid salary for March 2021.
3. The appellant submitted that the respondent employed him as a turnman from 17 December 2015 to 25 May 2021, when his employment was unfairly terminated. His main duties were to accompany



- the driver, load and unload goods into motor vehicles, change tyres and other duties as allocated. He worked 7 days each week without a rest day at a wage of ksh.5, 000 per month. He claimed that he was underpaid contrary to the Wage Orders, did not take any annual leave, worked overtime without compensation, remained at work during gazette public holidays, and was not allowed to take a rest day.
4. The appellate submitted that no statutory dues were remitted for the duration of his employment with the respondent.
 5. On 15 May 2021, while the appellant was at work in Gulu, Uganda, he directed the driver of motor vehicle No. KBE 929H went to the parking lot, but he lost control and ran over his leg. The appellant sustained injuries and was treated at the hospital for 9 days. The accident was reported to the respondent, who facilitated treatment but abandoned him in the hospital on 25 March 2021, when he was discharged. The director, Mr Bokhol, called and told the appellant that his employment had been terminated and that he needed to find his way back to Kenya.
 6. The appellant submitted that his employment was terminated without due process and, hence, unlawful and unfair. He had no notice or reasons given. He claimed for his terminal dues;
 - a. Salary for May 2021 per the Wage Orders Ksh.16,857;
 - b. One month notice pay Ksh.16,857;
 - c. Unpaid house allowance for 38 months Ksh.83,555.54;
 - d. Leave pay for 5 years ksh.73,983;
 - e. Unpaid rest days Ksh.389,091.60;
 - f. Unpaid public holidays Ksh.91,215.20;
 - g. Underpayments ksh.466,214.80;
 - h. 12 months compensation Ksh.202,292.16;
 - i. Certificate of service;
 - j. Costs of the suit.
 7. The appellant further submitted that despite the findings by the trial court that there was no procedural and substantive fairness, the trial court did not assess his claims. No work records were filed by the respondent to challenge the employment status of the appellant as held in *Julius Mutwiri v Haggai Multi-Cargo Handling Service Limited* [2013] eKLR. The court failed to appreciate that the previous claim differed from a WIBA claim. Whereas one is addressed and processed following the DOSH I Form, the other relates to employment claims due at the end of employment. The employer should file all the necessary work records to support its claim on payment of lawful wage, notice pay, house allowance without underpayments, annual leave records, allocation of a rest day each week, and that during the public holidays, the appellant was compensated as held in *Fredrick Ouma Otieno v Falcon Signs Limited* [2020] eKLR. The appeal should be allowed with costs.
 8. The claim for underpayment is justified as there is a minimum wage, and an employer should not pay below the legal minimum as held in *Patrick Nyakundi v Kenya National Union of Teachers (KNUT Headquarters) & another* [2017] eKLR. Taking annual leave is a legal right under section 28 of the *Employment Act* and, where not taken, should be encashed. Off days are regulated under Section 27 of the *Employment Act*, and they should be compensated if not taken as held in *Sendeu Omwenga v*



General Timothy Misiani Orwenyo t/a GMT Services [2019] eKLR. These are claims due at the end of employment, including salary for days worked, which were not paid for in March 2021.

9. The respondent submitted that the appellant was employed on 17 December 2015 but was not dismissed from his employment on 25 May 2021, as alleged. He was on duty in September 2021 and could not be dismissed in March 2021, as alleged.
10. The respondent submitted that on 14 July 2021, the appellant lodged a work injury claim but was not injured while at work. Employment has never been terminated, and the appellant remains the respondent's employee. The claims made are not justified and should be dismissed with costs.
11. The respondent submitted that from the police abstract form from Oyam police station, Uganda, the record indicated that the appellant was hit by a different vehicle. In the Discharge Voucher, he confirmed these facts. There was no termination of employment as alleged. The appellant had major contradictions in his evidence, which dented his case, leading to the dismissal of his claims. In the case of John Mukisi Kioko & 3 others v Primi Piatti Limited & another [2022] eKLR, the employee must establish a prima facie case that there was an unfair termination of employment. Upon discharging such burden, the employer should discharge its burden of justifying the reasons leading to termination of employment. In the case of Rachael Kanini Msatu v One Way Cleaning Services Limited [2018] eKLR, the employee was unsure of when employment was terminated. Thus, the employer correctly asserted that employment had not been terminated.
12. The appellant alleged that his employment was terminated on 25 March and 25 March 2021. The respondent testified that the appellant was still an employee. The witness called and confirmed that the respondent had no director called Bokhol and that the appellant, having been an employee for 6 years, should have known this fact.
13. The respondent submitted that the allegations that there were underpayments are not correct. The wage of Ksh.5, 000 was mutually agreed upon by the parties. In Patrick Nyakundi v Kenya National Union of Teachers (KNUT Headquarters) & another [2017] eKLR, the court held that the employee is estopped from claiming underpayments where the wage is voluntarily accepted. The claim for leave days was not particularized as held in Benjamin Maundu v Telkom Kenya Limited [2020] eKLR. These claims are exaggerated on the alleged unposted days and public holidays and should not be awarded as held in Sendeu Omwenga v General Timothy Misiani Orwenyo t/a GMT Services [2019] eKLR. In a case where the employee alleges to have worked overtime, it is not feasible nor humanly possible that an employee has constant overtime hours running for several years. Such exaggeration should not be allowed.
14. The respondent submitted that notice pay is not due without termination of employment. Under the Memorandum of Claim, the appellant alleged that his employment terminated on 25 May 2021, whereas, in the written submissions, he asserts that termination occurred on 25 March 2021. The submissions cannot amend these contradictions, and his pleadings bind him.
15. The respondent submitted that the agreement to pay monthly wages at Ksh.5 000 was consolidated, inclusive of house allowance, and thus, the trial court considered the law and dismissed the claim.
16. The trial court heard the parties and held that employment was not contested. The appellant was employed as a turn man from 17 December 2015 to 25 May 2021 but was not issued with a letter of appointment. The only record produced was the payment voucher dated 8 March 2021. The termination process was flawed for want of notice, which was awarded at ksh.16, 857.68.



Determination

17. This is a first appeal. The court can review the record, reassess the pleadings, review the findings, and conclude. However, the trial court could hear the witnesses and give that allowance.
18. The appellant's case is that he was employed by the respondent as a turnman from 2015 until 25 March 2021, when he was unfairly dismissed. He worked 7 days each week without a rest day at a wage of Ksh.5, 000 per month. He was never paid overtime for working during public holidays or allowed to take annual leave. There was no remittance of statutory dues to NSSF or NHIF. While on a journey in Uganda, he was involved in an accident leading to hospitalization and upon discharge, the respondent terminated his employment without notice, hearing or payment of his terminal dues.
19. The respondent's case is that they employed the appellant on 17 December 2015 as a turnman. The appellant claimed that while in Uganda, he was run over by the respondent's vehicle, but the report to the police indicated the accident was caused by a different vehicle. In the Discharge Voucher signed by the appellant, he admitted that the accident was caused by a different vehicle. Upon being discharged on 25 March 2021 from the hospital, the appellant did not resume work and is considered still an employee.

PARA 20.

There are contestations concerning the date his employment was terminated. The appellant pleaded that his employment was terminated on 25 March 2021 but submitted that this occurred on 25 May 2021 when the director called him. The respondent, on their part, still considers the appellant an employee.

21. However, when the appellant demanded payment of his terminal dues and pleaded that his employment had been terminated, the respondent still considered him an employee. This defence does not assist the respondent.
22. When the employee fails to attend work and acts so that the employment relationship no longer binds him, the employer is legally obliged to end the same formally. In the case of *Okode v Tejani* [2025] KEELRC 280 (KLR), the court held that under Section 18(5) (b) of the *Employment Act*, where the employer cannot trace the employee, or the employee is simply absent for no good cause, notice must be issued to the Labour Officer and any terminal dues deposited in such office. Then, the employer has undertaken its legal duty to end employment properly. Simply abandoning work is insufficient, as held in *SGA Security Solutions Limited v Mulei* [2024] KEELRC 1406 (KLR).
23. In the case of *Security Alert Services Limited v Kebuko* [2025] KEELRC 333 (KLR), the court held that;

... the employee who deserts, absconds, or abandons her employment does not dismiss herself. The decision to formally end the employment relationship should come from the innocent party, the employer.
24. The rationale is that absence from work without permission and approval by the employer is defined as gross misconduct under Section 44 of the *Employment Act*. The employer must notify the employee to attend and address such gross misconduct. The employer should bring the employee to account if he remains absent from work without permission. Where such gross misconduct is not addressed, the employer must invoke its rights, issue notice terminating employment to the employee, and copy to the Labour Office under Section 18(5)(b) of the *Employment Act*. Otherwise, employment terminates unfairly without valid reasons or justification, as held in *Ngei v Viljoen & 2 others* [2023] KECA 851 (KLR) and *Mbugua v Resort* [2024] KEELRC 1950 (KLR).



25. To stand back and accept that the employee is still serving his employment while aware that this is not the case is to engage in unfair labour practice. The formal release of the employee under Section 18(5) of the *Employment Act* is lawful and legitimate.
26. At the end of employment, whatever reason(s) justify the termination, the terminal dues must be assessed and paid in terms of Section 18(4) of the *Employment Act*.
27. Without the respondent undertaking its legal duty, employment is terminated unfairly. The execution of the discharge voucher is insufficient to exonerate the respondent from its legal duty under Section 35(4) of the *Employment Act*.
28. The trial court's findings that employment was terminated fairly based solely on the discharge voucher were in error.
29. Under section 45 of the *Employment Act*, notice pay and compensation are due where employment is terminated unfairly. Equally, under Section 18(4) of the *Employment Act*, the terminal dues claimed must be assessed on the merits. The trial court only addressed the matter of termination of employment without analyzing the claims.
30. Further, under Section 45(5) of the *Employment Act*, in assessing the compensation due, the court is called upon to consider the conduct of the employee and the procedures taken in addressing termination of employment and take these into account. In this case, the appellant alleges that he had an accident while in Uganda and was discharged on 25 March 2021. He alleged that he was called by the respondent's manager and told his employment had been terminated. He does not give a proper account of his whereabouts from 25 March to 25 May 2025 when he claims for his wages. The appellant's conduct is considered, the respondent does not correctly address the reasons leading to termination of employment, and compensation at one month's gross wage is due.

Notice pay is due at one month's gross wage.

31. On the claims for terminal dues, the respondent admitted that a wage of Ksh. 5,000 was paid by mutual agreement. Parties cannot consent to an illegality. The Wage Orders published by the Minister provide for the minimum wage. An employer cannot go below the minimum wage due to the Wage Orders.
32. A turn man working in Mombasa in 2021 earned a basic wage of Ksh.14 658.85 plus a house allowance of Ksh.2 198, 85, for a total gross of Ksh.16 857.65.
33. In this case, there was an underpayment of wages by Ksh.11, 857.65 each month.
34. An underpayment is a continuing injury. It occurs monthly and should be addressed under Section 89 of the *Employment Act* within 12 months from the date of cessation. See *Teacher Service Commission v Kibe* [2025] KECA 32 (KLR) and the case of *Kenya Agricultural and Livestock Research Organization v Kenya Scientific Research International Technical and Institution Workers Union* [2024] KECA 1577 (KLR) where the court held that payments which accrue monthly are in the category of continuing injury if not paid by the employer.
35. In this case, the appellant did not resume work after 25 March 2021. He filed suit on 17 August 2021. He cannot justify why he sat on his rights from 2015. He can only claim for underpayments going back to 16 August 2020, a period of 8 months tabulated from August 2020 to March 2021. The underpayment of Ksh.11 857.65 per month amounts to Ksh.94 861.42.
36. The claim for pay in May 2021 was for a period not worked. Such is not due.
37. The claim for house allowance is factored in the assessments for underpayments.



38. For rest days due under Section 27 of the *Employment Act*, the basis under Section 89 of the Act applies. Once due, such a continuing injury accruing weekly should be addressed within 12 months from the date of cessation. No work records are filed by the respondent on how rest days were allocated for the appellant or payment.
39. There are 32 off days due for the 8 months from August 2020 to March 2021. On the basic wage of Ksh.14, 658.85, the due pay for rest days is Ksh.15, 848.30.
40. The claim for annual leave is based on the fact that the appellant did not take his annual leave for 5 years. Taking annual leave is a right under Section 28 of the *Employment Act*. However, under Section 28(4) of the Act, leave does not accrue beyond 18 months unless the employer approves. In this case, without approval, the appellant is only entitled to 33 leave days based on the basic pay of Ksh.14, 658.85, and the total due is Ksh.16, 124.75.
41. On the claim for work during public holidays, the appellant claimed for various days for 5 years. Each public holiday is a special day published by the Minister. It must be particularized in the Memorandum of Claim to allow the employer to give a proper account and record. In this case, the appellant has outlined that the public holidays worked while the respondent made mere denials. No record of payment for such days has been entered. The tabulations are based on the daily wage, which is higher than the due monthly wage because the appellant was not a casual employee.
42. On the basic wage of Ksh.14,658.85, the public holidays worked from March 2021 going back 12 months are all due at 14 days at Ksh.498.25, for a total due of Ksh.6,933.65.
43. The double allocation for rest days and public holidays outlined under the Memorandum of Claim fails to acknowledge the due wage paid and the underpayment addressed.
44. As analyzed above, notice pay is due at one-month gross pay of Ksh.16, 857.65. Compensation is awarded at Ksh.16, 857.65.
45. The claim for a Certificate of Service is due at the end of employment in Section 51 of the *Employment Act*. The position was taken by the respondent that employment subsists addressed above, such certificate should be issued to the last date the appellant was at the shop floor.
46. On costs, the appellant's claim is with merit. The appellant is entitled to his costs before the trial court. For the appeal, each party is to bear its costs.
47. Accordingly, the judgment is Mombasa CMELRC No. E516 of 2021 is hereby reviewed and the following orders issued;
 - a. Employment terminated unfairly;
 - b. Compensation Ksh.16,857.65;
 - c. Notice pay Ksh.16,857.65;
 - d. Underpayments Ksh.94,861.42;
 - e. Leave pay Ksh.16, 124.75.
 - f. Off days Kshs.15, 848.30.
 - g. Public holidays Ksh.6,933.65;
 - h. Certificate of service;



- i. Costs of the trial court proceedings;
- j. For the appeal, each party bears its costs.

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

M. MBARŪ

JUDGE

