



REPUBLIC OF KENYA



Mohamed v Balali (Appeal E106 of 2024) [2025] KEELRC 758 (KLR) (6 March 2025) (Judgment)

Neutral citation: [2025] KEELRC 758 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

APPEAL E106 OF 2024

M MBARŪ, J

MARCH 6, 2025

BETWEEN

JELAN ABU MOHAMED APPELLANT

AND

HUSSEIN YUNIS BALALI RESPONDENT

*(Being an appeal from the judgment of Hon. L. Sindani delivered
on 9 May 2024 in Mombasa CMELRC No.E620 of 2022)*

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMERLC No.E620 of 2022. The appellant seeks that the judgment be varied, substituted, or set aside with costs.
2. The appellant's case is that the trial court erred in holding that the respondent was unfairly terminated from his employment when evidence showed that he had deserted duty. Hence, the award of Ksh.104, 000 as a service way for 13 years was not justified. The assessment of house allowances at Ksh.362, 400 despite the evidence that the wage paid was consolidated was in error. The respondent was allowed his annual leave annually, but the trial court awarded him Ksh.33, 579.
3. The appeal is that the trial court erred in law and fact in holding that there was summary dismissal despite the respondent destroying a water pump.
4. The appellant submitted that under Section 47(5) of the *Employment Act*, the employee has the burden to prove unfair termination of employment, and the employer has the burden to justify reasons for termination of employment as held in Pius Machafu Isindu v Lagington Security Guards Limited [2017] eKLR. In this case, the respondent deserted duty, and despite efforts to trace him, he did not give notice or give reasons. The awards by the trial court were not justified, as held in Julius Mutana Ngigi v Cobra Security Co. Ltd [2021] eKLR. The awarded house allowance was not justified since there was a consolidated wage of Ksh.16, 000 as held in Charity Wambui Muriuki v M/S Total Security Surveillance Ltd [2017] eKLR.



5. The respondent submitted that he was employed as the day security guard on 1 December 2009 at the appellant's premises in Kizingo, Mombasa. His wage was Ksh.16, 000 per month. He worked until 13 October 2022, when his employment was unfairly terminated on allegations that he had destroyed a water pump, which was false. He was then forced out of the premises. He claimed the following dues;
6.
 - a. Notice pay Ksh.16,000;
 - b. Unpaid salary for 13 days in September 2022 Ksh.6,929;
 - c. House allowance for 151 months Ksh.362,400;
 - d. Unpaid leave for 13 years Ksh.145,000;
 - e. 12 months compensation Ksh.192,000;
 - f. Unremitted NHIF for 151 months Ksh.75,000;
 - g. Service pay for 13 years Ksh.104,000;
 - h. Certificate of service;
 - i. Costs.
7. The appellant submitted that the wage paid to the respondent was Ksh.16, 000 which included house allowance. The respondent had a poor work record and was beset with several disciplinary issues, including incompetence and sabotage of security. On 13 October 2022, the respondent destroyed a water pump, and when asked about it, he abandoned his workplace and never returned. Despite several efforts to reach him through his phone 07294---- 62, he did not pick up his calls and could not explain his whereabouts. No summons were issued to the Labour office as alleged by the respondent, and the allegations made are without merit.
8. In a counterclaim, the appellant submitted that due to the respondent's conduct and desertion of duty, there was loss and damage of Ksh.16, 000, equivalent to one month's notice pay, which is due with costs.
9. The learned magistrate held that absconding duty is grounds for termination of employment but must be proved. An employer who alleges that the employee has deserted duty must demonstrate that efforts have been made to reach out to the employee.
10. The learned magistrate heard the parties in evidence, and the appellant's witness testified that he talked to the respondent about resuming his duties, but he refused. However, an employee who refused to return to work would not then proceed to report his case to the labour office. In this case, there was an unfair termination of employment by summary dismissal. There was no proof of desertion but summary dismissal.
11. The trial court made the following awards;
 - a. Notice pay Ksh.16,000;
 - b. House allowance Ksh.362,400;
 - c. 9 months' salary compensation Ksh.144,000;
 - d. Pay for 13 days Ksh.6,929;



- e. Unpaid leave Ksh.33,579;
 - f. Service pay ksh.104,000;
 - g. Certificate of service;
 - h. Costs and interests.
12. The appellant asserts that the respondent abandoned duty when he was asked about a water pump he had destroyed on 13 October 2022.
 13. In his evidence, Jelani Abu Mohamed testified that he had no evidence of the destroyed water pump. He only tried to reach out to the respondent after failing to report to work but had no such phone records.
 14. Desertion or abandonment of duty is an act of gross misconduct. However, the employee does not terminate his employment. Upon abandonment or desertion of duty, the employer must bring the employee to account for such gross misconduct under Sections 44 and 41 of the *Employment Act*. The legal safeguards under Section 41 of the *Employment Act* are not meant for use by the employee but by both parties in an employment relationship.
 15. The employee is allowed to attend and address the issue with his response. The employer is secured when the employee fails to attend and gives no response. The notice of summary dismissal must be issued to the employee. Where the employee cannot be traced or is not responsive, section 18(4) of the *Employment Act* allows the employer to serve the notice upon the Labour Office. This secures the employer from any claims as herein made by the respondent that there was unfair termination of employment.
 16. In the case of *Cheptanui v Rift Valley Bottlers Company Limited* [2022] KECA 824 (KLR), the court held that the employee who had abandoned her duties was issued a notice to show cause but failed to attend. The resulting notice terminating employment was lawful. In *Brinks Security Services Limited v Timothy* [2024] KECA 690 (KLR) and *Central Furniture Shop Limited v Mohamed* [2025] KEELRC 199 (KLR), the court held that by leaving the respondent at large over alleged abandonment of duty without notice to attend and address or issuance of notice terminating employment, termination of employment was unlawful.
 17. The appellant did not apply the law, which led to unlawful and unfair termination of employment.
 18. The trial court's findings were well addressed, and the reliefs granted in notice pay and compensation were justified.
 19. Regarding the reliefs sought for days worked, the 13 days worked in September 2022 should have been paid for. The appellant did not submit evidence of payment, and the Mpesa statement produced by the respondent was not challenged.
The sum of Ksh.6, 929 is due and justified.
 20. The claim for a house allowance for 151 months from December 2009 to October 2022 was awarded as pleaded. However, non-payment of a house allowance where due accrues monthly, hence a continuing injury as defined under Section 89 of the *Employment Act*. Where such accrues, it should be addressed within 12 months upon cessation of such injury and damage as held in *Warrakah (Suing as the Administrator and Legal Representative of the Estate of Gakweli Mohamed Warrakah - Deceased) v Mwatsami* [2024] KECA 579 (KLR) that a continuing injury, its continuance after the date of the first action is a new cause of action for which a second action can be brought, and so from time to time until the injury is discontinued. This position is reiterated in the case of *Kenya Agricultural and*



Livestock Research Organization v Kenya Scientific Research International Technical and Institution Workers Union [2024] KECA 1577 (KLR) and Kenya Railways Corporation v Ododa & 216 others [2024] KECA 1620 (KLR) that The law provides that the time limit of filing claims of continuing injury or damage should be within 12 months after cessation of the continuing wrong. Section 89 of the *Employment Act* should thus be interpreted to mean that regardless of the three-year lapse for the institution of employment disputes if an employer continues to breach a term of the agreement agreed between the employer and employee, the employer remains liable until the breach is purged.

21. In this case, the house allowance due was not paid every month. The claim was filed in November 2022, so any claims due could only go back 12 months to October 2021.
22. The respondent was employed as a day security guard at a wage of Ksh. 16,000. Under Section 31 of the *Employment Act*, the employer is allowed to pay a consolidated wage, but it should not be below the legal minimum per the Wage Orders published by the Minister.
23. In September 2022, the minimum wage for a day security guard was ksh.15,201.65, the house allowance due at 15% Ksh.2,280.75 gross wage was Ksh.17,481.90, and the underpayment in house allowance of Ksh.1,481.75.

For 12 months, the unpaid house allowances amount to Ksh.17, 782.77.

24. For accrued leave days for 13 years, the learned magistrate awarded leave for 3 years. This should be assessed under Section 28(4) of the *Employment Act* for 18 months only. This is 33 days on the basic wage of Ksh.15, 201.65 at Ksh. 16,721.85

NHIF dues are not payable to the employee.

25. On the claim for service pay, there is no record filed by the appellant on any remittances of statutory dues. Such record is due under Section 20 of the *Employment Act*. Based on the gross wage due at Ksh.17,481.90 for 15 days for every year worked from December 2009 to December 2021 for 12 years, the service pay owing under Section 35(5) and (6) of the *Employment Act* is Ksh.104,891.40.
26. A certificate of service is due at the end of employment, regardless of the reasons for the end of the employment relationship.
27. The trial court awarded costs from the date of filing suit with interests. Under Section 12(4) of the *Employment Act*, the award of costs must be justified, which is not done in this case. The discretion to award costs upon payment of the owing terminal dues must be applied judicially.

In this regard, each party is to bear its costs.

28. Accordingly, the judgment in Mombasa CMEELRC is hereby reviewed in the following terms;
 - a. Employment terminated unlawfully and unfairly;
 - b. Compensation Ksh.144,000;
 - c. Notice pay Ksh.16,000;
 - d. House allowances Ksh.17, 782.77.
 - e. Leave pay KS. 17,782.77.
 - f. Service pay Ksh.104,891.40;
 - g. Certificate of service;
 - h. Each party bears its costs for the appeal and trial court.



DELIVERED IN OPEN COURT AT MOMBASA THIS 6TH DAY OF MARCH 2025.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

