



**Firimbi t/a Sinai Hotel v Imungu (Appeal E131 of 2024)
[2025] KEELRC 1283 (KLR) (6 May 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1283 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E131 OF 2024**

**K OCHARO, J
MAY 6, 2025**

BETWEEN

ABDULAH FIRIMBI T/A SINAI HOTEL APPELLANT

AND

JANE IMUNGU RESPONDENT

(Being an Appeal against the Judgment and Decree of Honourable M. NABIBYA S.P.M in the Chief Magistrate's Court at Mombasa, ELRC NO. 465 Of 2021 delivered on 23rd May 2024.)

JUDGMENT

Introduction

1. The appeal herein, which has been initiated vide a Memorandum of Appeal on 21st June 2024, assails the Judgment of the trial Court in the cause mentioned above, putting forth principal grounds that she erred in law and fact;
 - a. In holding that the Respondent did not abscond from duty and that the Appellant failed to reach out to her, to recall her or issue a notice to show cause and hold a disciplinary hearing.
 - b. In holding that the Respondent was terminated from employment by the Appellant, such termination was unfair.
 - c. In holding that the Respondent was entitled to one month's salary in lieu of notice, KShs. 13,572, house allowance of KShs. 73,924.20, unpaid leave of KShs. 28,503, service pay, KShs. 54,292, and two months' salary of KShs. 27,146.
 - d. By failing to consider the material of the Appellant contained in the Appellant's pleadings, evidence, exhibits, and submissions.



2. When the matter came up for directions on the hearing of the appeal on 4 November 2024, this Court ordered that the appeal be canvassed through written submissions and gave timelines for the parties to file their respective submissions. They complied.

The Respondent's case before the Trial Court

3. The Respondent asserted that she commenced her employment with the Appellant as a Room Steward on the 18th of May, 2017, continuing until the 4th of May, 2021, at which point her employment was unlawfully and unfairly terminated.
4. The Appellant's Human Resource Manager communicated the dismissal verbally. He did not inform her of the reasons for terminating her employment contract. The Respondent failed to allow her an opportunity to defend herself.
5. She contended that for the entire period she was in the Appellant's employment, she was not allowed to proceed for her annual leave. Further, she was not paid a house allowance as required by law.
6. Her monthly salary was KShs. 9000, which was well below the minimum wage. As such, she was being underpaid.
7. She asserted that by reason of the premises, she was entitled to the following reliefs;
 - a. One month's salary in lieu of notice.
 - b. House allowance for 48 months at the rate of 15% of his basic salary.
 - c. Unpaid leave days
 - d. Compensation for unlawful termination.
 - e. Unpaid overtime.
 - f. Service pay.
 - g. Salary underpayments,

The Appellant's case before the Trial Court

8. The Respondent asserted through the evidence of its Human Resource [H.R] Manager, that the Respondent first came into their employment as a Room Steward at a monthly salary of KShs. 9000.
9. Due to the COVID-19 pandemic, the Appellant's business was adversely affected. Their performance dwindled.
10. It is a widely acknowledged fact that the government-imposed movement restrictions to contain the pandemic. Consequently, this led to the temporary closure of the Respondent's business and a cessation of operations, as the prospects of attracting clients significantly diminished.
11. As the business began to pick up, the Appellant opted for employees to work in shifts rather than being laid off. They would work from 8 a.m. to 5 p.m. Despite working in intervals, the Appellant maintained the payment of their full salaries.
12. The Claimant, expressing dissatisfaction with shift work, abandoned her duties in May 2021 and filed a complaint against the Appellant with the Labour Office, alleging that her employment had been unjustly terminated. The issue was discussed at the Office, and it was determined that the Respondent's employment had not been terminated. It was concluded that she had been requested to take a paid



break, as the Appellant would not have all employees present at the workplace, given the absence of clients.

13. She acknowledged at the Labour Office that the Appellant contacted her to return to work. However, she did not comply with this request. She failed to notify the Appellant of her intention to terminate her employment. She abandoned her duties. Her claim is fundamentally unsound.

The Appeal.

14. The Appellant, aggrieved by the decision of the Trial Court, filed the present Appeal on the grounds set out hereinabove.

Analysis and Determination

15. Firstly, given that this is the initial appeal, this Court must reconsider and re-evaluate the evidence and materials presented before the trial Court, arriving at its own independent findings and conclusions. This position is articulated in detail in the case of *Selle -vs- Associated Motor Boat Co.* [1968] EA 123; see also *Abdul Hameed Saif vs. Ali Mohamed Sholan* [1955] 22 E. A. C. A. 270, where the Court held:

“An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this 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 this 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 (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955), 22 E.A.C.A. 270)”.

16. Aware of its responsibilities, this Court has examined the Appellant’s Record of Appeal, resulting in the identification of the following issues that will be determinative of the present appeal:
 - a. Whether the esteemed Trial Magistrate committed an error in both fact and law by concluding that the termination of the Respondent’s employment was unjust.
 - b. Whether the esteemed Trial Magistrate erred in both law and fact in granting the reliefs to the Respondent.
17. There is no dispute over the alleged unfair termination of the Respondent’s employment, which was reported to the Labour Office. Additionally, there were discussions between the employer (Appellant) and the employee (Respondent). I have closely reviewed the handwritten meeting minutes, showing that the Appellant claimed she was fatigued by the work breaks and unwilling to continue her employment. She appeared to lack appreciation for the pandemic’s impact on society and the Appellant’s efforts to support employees with full salary during these difficult times.
17. The learned Trial Magistrate didn’t consider the pivotal evidence- the minutes. Had she, she would have appreciated that the Claimant deliberately and willingly worked out of her employment relationship.
18. The Appellant contended that they contacted the Respondent to resume her duties; however, she did not comply. She acknowledged this fact in her testimony during cross-examination. In my opinion, when an employee explicitly expresses her unwillingness to return to work, despite being called upon by the employer, as was the case in the interaction between the Appellant and the employer, the employee’s conduct should be considered constructive resignation.



19. By reason of the premise, I hold that the Learned Trial Magistrate erred both in law and fact when she found that the Respondent's employment was unfairly terminated.
20. A critical consideration of the Respondent's case before the trial Court reveals that he had pursued two categories of relief. Those that were tightly anchored to the claim for unfair termination and those which could be deemed as independent of the claim, and as such grantable [where justified] with or without the success of the unfair termination claim.
21. Having found as I have hereinabove, it goes without saying that the relief, compensatory award under section 49[1][c] of the *Employment Act*, and notice pay should not have been granted.
22. The Respondent claimed underpayments, alleging that at all material times, the Appellant paid her salary below the minimum wages stipulated by the then-relevant Wage Orders. In my view, this claim was justified under section 48 of the *Labour Institutions Act*. The Respondent placed the various Wage Orders before the Learned Trial Magistrate. The Appellant didn't contend that they did not apply to the Respondent or that they [Appellant] adhered to the minimum wages when paying the Respondent her salary at all material times. Therefore, the Learned Magistrate didn't err when she allowed the claim under the head.
23. The Appellant contends that though the Respondent alleged underpayment in her pleadings, she did not particularise the claim, and as such, the trial court was in error when it granted the relief. I have considered paragraph 2.9 of the statement of claim, and noting that pleadings are not supposed to contain evidence, I am convinced that the details supplied thereunder were sufficient for describing the claim and the notification intended for the adversary.
24. Under section 31 of the *Employment Act*, 2007, the employer is enjoined as a statutory obligation to provide accommodation for their employees or a house allowance in lieu thereof. I have carefully considered the material that was placed before the trial Court. It doesn't come out that the Appellant established that they were providing accommodation for the Respondent or paying her a house allowance in lieu thereof. An award of house allowance was merited.
25. The Appellant asserted that, at all material times, the Respondent was granted leave days as requested, in addition to the statutory leave days. The Appellant did not present any materials before the trial Court to substantiate this assertion. Under Section 74 of the *Employment Act*, the employer must maintain the employee's employment records. When a dispute regarding an issue whose resolution significantly depends on the record's production, and the employer inexplicably fails to produce the record before the Court, an adverse inference shall be drawn against the employer.
26. In the circumstances of the matter, the award of compensation for earned but unutilised leave days was justified.
27. Under section 35 of the *Employment Act*, service pay is a statutory benefit available to employees whose employment can be terminated as outlined in the section, except for the category of employees mentioned in section 35[6]. Although the Appellant asserted that the Respondent was a National Social Security Fund member, it did not present any evidence to support this assertion.
28. In the upshot, the Appellant's appeal herein succeeds partially in the following terms;
 - a. The Learned Trial Magistrate's holding that the Respondent's employment was unfairly terminated is set aside, and in substitution thereof, this court finds that the Respondent constructively resigned from her employment.



- b. By reason of [a] above, the award of compensation for unfair termination of employment and payment of salary in lieu of notice is set aside.

29. Each party shall bear its costs of the appeal.

READ, DELIVERED AND SIGNED THIS 6TH DAY OF MAY 2025

OCHARO KEBIRA.

JUDGE

