Baru v Kiara (Employment and Labour Relations Appeal E033 of 2024) [2025] KEELRC 2381 (KLR) (14 August 2025) (Judgment)

Neutral citation: [2025] KEELRC 2381 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E033 OF 2024

ON MAKAU, J

AUGUST 14, 2025

BETWEEN

JOYCE WANJIRU BARU ..... APPELLANT

AND

JUSTUS NDIRANGU KIARA ..... RESPONDENT

(Being an appeal from the Judgment of Hon. M GITUMA (SRM) delivered on 2nd October 2024 in Nyeri MCELRC Cause No. E077 of 2023)

JUDGMENT

Introduction

1. The appeal herein seeks setting aside of the entire judgment of the lower court delivered on 2nd October 2024 on the following grounds: -

    a. The learned trial Magistrate erred in fact and law in making declaration that the respondent was unfairly terminated from employment while the respondent did not prove that the appellant at any time illegally/unlawfully dismissed the respondent from employment either verbally, through telephone and or in writing by the appellant in the alleged month of August 2023 and any departure was hence voluntarily and thereby unjustifiably accorded incidental remedies to the respondent emanating from the said declaration.

    b. The learned trial Magistrate erred in law and fact by barely making a finding that the respondent was in the appellant employment commencing January 2010 instead of the year 2017 as per the respondent indicated that the only payment made on monthly basis was vide the respondent Mpesa account payments and which documents as provided by the respondent related to period between the year 2017 until August 2023 hence the remedy afforded were burdensome and related to unproved periods of work outside the respondent pleadings.

c. The learned trial Magistrate erred in fact and in law in reaching a conclusion that the respondent worked for 84 hours in week while on the other hand the appellant had given evidence that the respondent worked for 8 hours commencing 11pm to 6.00am and neither did the respondent work on Saturday and Sunday and was accorded one day off being a Monday of every week never worked on holidays and was accorded every year 21 day leaves hence the respondent was not entitled to any remedy to that effect based on the said heads of claim.

d. The learned trial Magistrate erred in fact and in law in failing to consider the appellant evidence, written submission and hence her analysis was only one sided/biased in favour of the respondent and would have reached a different conclusion if the trial Magistrate considered the appellant evidence and submissions.

Facts

2. The appellant allegedly employed the respondent as a night security guard at her hotel in Nyeri town, from January 2010. His starting salary was Kshs.6,000 but it was increased to Kshs.10,000 per month. He never went on leave save for one off day per week, he used to work, from 6pm to 6am daily even on public holiday without compensation for the overtime worked. No NSSF or NHIF was remitted for him during his employment.

3. The respondent worked until 28th August 2023 when allegedly he received a call from the appellant telling him not to report back to work again. However, the appellant denied the alleged termination and averred that the respondent worked from 2017 to August 2023 when he voluntarily deserted work. She admitted that she was paying the respondent Kshs.10,000 and also gave him food but denied that he was working overtime and public holidays or Sundays. She added that the respondent went for all his annual leaves.

4. During the hearing, the respondent adopted his written statement dated 4th October 2023 as his evidence in chief and produced 3 documents as his exhibits. The evidence was a repetition of the facts in the pleadings summarized above.

5. On cross-examination, he admitted that his Mpesa statements showed payments from 4th December 2017 and not 2010 to 2016. He further admitted that he was going for one day leave every week but maintained that he was working daily from 6pm to 6am. He further confirmed that the hotel was closing at 11pm but denied that he was guarding from 10pm to 6am. He confirmed that there were other employees.

6. He reiterated that he was called on phone by the appellant on 28th August 2023 telling him not to report to work but he had no evidence to prove phone call. He contended that he filed claim at the Labour office but it was not resolved because the appellant offered to pay him Kshs.20,000 and he refused.

7. The appellant testified as RW1 by adopting her written statement dated 30th January 2024 and produced one document as exhibit. On cross examination, she admitted that she employed the respondent as a night guard for a monthly salary of Kshs.10,000 which was paid via Mpesa.

8. She denied that she terminated the respondent's employment through a phone call and maintained that he voluntarily left his employment. She admitted that she was called to the Labour office where the respondent took the matter and she denied that she terminated respondent's employment. She denied that the respondent worked from 2010 – 2023 and maintained that he worked from 2017 to 2023 and he never complained about the agreed salary. She admitted that the respondent worked during some public holidays and went off during others. He also took 21 days leave annually.

9. After considering the evidence and submissions from both sides, the trial court concluded that the respondent's employment was unfairly terminated and awarded him compensation of 12 months salary. It further awarded him one-month salary in lieu of notice and directed the Labour officer to calculate the claims for overtime, public holidays worked, house allowance, leave days, and service pay within 21 days of the date of the judgment. The court provided guidelines to the Labour officer upon which to calculate the said claims.

10. The appellant was aggrieved and appealed. The appeal was disposed of by written submissions.

11. It was submitted for the appellant that the respondent did not prove unfair termination. Section 107 and 108 of the *Evidence Act* were cited to urge that the burden of proof is on the party seeking judgment from the court. It was argued that the appellant denied ever terminating the respondent's employment through phone call and the respondent never proved otherwise. For emphasis, reliance was placed on Dungani v West Kenya Sugar Company Limited (2024) KEELRC 172 (KLR) where the court held that for a complaint of unfair termination, the burden of proof is upon the employee to prove that the unfair termination occurred.

12. It was further submitted that the respondent did not prove that he worked from 2010 to 2023 but rather from 2017 to 2023. Finally, it was submitted that the respondent was not entitled to the damages awarded to him by the trial court and as such the same ought to be set aside with costs.

13. On the other hand, it was submitted for the respondent that, the appellant terminated the services of the respondent unfairly contrary to section 41,43 and 45 of the *Employment Act*. It was submitted that once an employee alleges that termination was unlawful, the employer must prove that the dismissal was substantially and procedurally fair. It was argued that the trial court's judgment was well founded on the law and precedents and remains unshaken.

14. It was further submitted that the respondent was employed from 2010 to 2023 as the appellant in page 138 of the Record of Appeal, sought refund of salary overpaid to the respondent from January 2010 to August 2023. It was further submitted that the appellant did not produce employment records to prove the date when the respondent started working and when he left. For emphasis, reliance was placed on Wafula v Gurdit Singh Shop (2022) KEELRC 15 (KLR).

15. It was also submitted that the respondent proved that he was working 12 hours per day equaling to 84 hours per week which is in excess of the 52 hours allowed by the Protective Security Services Order. In addition, it was argued that the allegation that the respondent was going for 21 days leave every year has not been proved by employment records.

16. Finally, it was submitted that there was no judicial bias on the part of the trial court as alleged by the appellant. Reliance was placed on Benta Achieng Odinyo v University of Nairobi (2021) eKLR to urge that cogent evidence is required to prove that the court acted in a biased manner. In the circumstances, the court was urged to dismiss the appeal herein with costs.

17. The mandate of this court in this appeal is to re-evaluate the evidence on record and reach its own independent conclusions on the issues raised. See Selle v Associated Motor Boat Company Ltd (1968) EA 123 where the court held thus: -

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must consider the evidence, evaluate 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, the 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."

18. Having perused the evidence on record and the submissions filed herein, the following issues fell for determination: -

    a. Whether the respondent voluntarily left his job or he was unfairly and unlawfully dismissed by the appellant.

    b. Whether the awards by the trial court should stand.

Resignation or unlawful dismissal

19. The respondent alleged that he was dismissed via a phone call on 28th August 2023 whereby he was told not to report back to work but the appellant denied that allegation. Under section 107 of the *Evidence Act*, the respondent had the burden of proving that he received a call from the appellant telling him not to report back to work. Whereas the respondent produced Mpesa statement to prove that he was paid salary on 28th August 2023, he never produced anything like call logs to prove that he was called by the appellant on the said date. He also did not state the time when the call was made.

20. Having carefully considered the evidence on record, I find that the respondent did not prove that he was dismissed from work by the appellant via phone call or at all. Without evidence of dismissal by the employer, an employee who stops attending work must be presumed to have resigned. Whereas it is required that an employer takes steps to contact an employee before dismissing him for desertion, I see no reason why an employer should be held liable for dismissal just because he never bothered to pursue a deserting employee.

21. In my view, the only time the employer becomes liable is when he relies on the desertion to dismiss the employee. Consequently, where an employee quietly leaves employment without notice like in this case and the employer forgets about him, the employer is innocent. Deciding otherwise is shifting the burden of proof of alleged termination from the employee to the employer before any evidence of dismissal is tendered.

22. Accordingly, I find that the evidence by the respondent did not discharge the burden of proving that he was dismissed by the appellant, but there is evidence that he stopped attending work from 28th August 2023 without prior notice to the appellant. There is also evidence proving that he was paid all his salary as at that date. Consequently, I hold that the finding of fact by the trial court that the appellant unlawfully terminated respondent's employment was not supported by the evidence. Accordingly, I proceed to set it aside and substitute it with a finding that the respondent left his job voluntarily and without prior notice to the employer.

Reliefs

23. In view of the foregoing, I further find that the respondent was not entitled to compensation for unfair termination and salary in lieu of notice. Consequently, the awards of 12 months' salary compensation plus one-month salary in lieu of notice cannot stand and therefore are set aside.

24. As regards the claims for house allowance, service pay, leave, public holidays worked and overtime worked, the main controversy was whether the respondent served from 2010 or from 2017. The only evidence adduced was Mpesa statement from 4th December 2017 to August 2023. The appellant stated that she employed the respondent from 2017 to 2023.

25. There is evidence that claimant was paid salary of Kshs.10,000 and he was not housed by the employer. The employer also never proved that she contributed NSSF for him as no records were produced as exhibits. She admitted that the respondent worked 72 hours per week plus some of the public holidays. The respondent did not adduce any documentary evidence or call/eye witness to prove that he worked for the appellant from 2010-2023. Consequently, I find that the trial court's finding that calculation of the said accrued benefits from January 2010 was also not supported by the evidence on record. In fact, the appellant prayed in her counter claim for an order that the respondent was not employed from 2010-2023.

26. In view of the foregoing observations, I find that the respondent worked from 2017-2023 and as such he is only entitled to house allowance, service pay, overtime, leave and public holidays worked from December 2017 to August 2023. The work of assessing and determining the amount payable is a judicial duty to be concluded by the court. In fact, its abdication of duty for the trial court to "direct" the labour officer to compute the damages payable and have it paid by the employer before the court sees and approves the same.

27. It follows that where a trial court requires assistance of a Labour officer or other expert in computing an award, it must require that a report be filed in court for its approval as the final quantum of damages payable.

28. Having said that, I must fault the trial court for directing the Labour officer to compute the sums payable to the respondent in respect of house allowance, service pay, overtime and public holidays and have the appellant pay within 21 days of the judgment. Consequently, I set aside that direction for being a clear abdication of duty by the trial court and also for offending the rules of fair trial including the right to challenge the computation of the Labour Officer.

Conclusion

29. I have found that the claim for unfair and unlawful termination was not proved against the appellant on a balance of probability and as such the award of compensation and salary in lieu of notice cannot stand. I have further found that the respondent did not prove that he worked from 2010 to 2023 but rather from December 2017 to August 2023. I have also found that the award of house allowance, overtime, service pay, public holiday and leave shall stand save that they shall be computed from December 2017 to August 2023. Finally, I have found that computation of damages payable to a claimant is a judicial duty which starts and end with the trial court, so that any assistance sought in computation should not yield to a separate decision from that of the court. Consequently, I partially allow the appeal as highlighted above, and make the following orders: -

    a. The claims for unfair and unlawful dismissal, compensation and salary in lieu of notice are dismissed entirely.

    b. The claims for house allowance, service pay, overtime, leave, and public holidays worked are referred back to the lower court to be determined with or without the assistance of the Labour officer as guided in this judgment. The referral is to any other Judicial officer other than Hon.Gituma SRM.

    c. Since the appeal succeeded partially, each party shall bear own costs of the appeal and the court below.

DATED, SIGNED AND DELIVERED AT NYERI THIS 14TH DAY OF AUGUST, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.