



REPUBLIC OF KENYA



Kibeti v New Embu Garage Limited (Employment and Labour Relations Appeal E001 of 2022) [2024] KEELRC 58 (KLR) (26 January 2024) (Judgment)

Neutral citation: [2024] KEELRC 58 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2022
ON MAKAU, J
JANUARY 26, 2024**

BETWEEN

MARGARET WANJIKU KIBETI APPELLANT

AND

NEW EMBU GARAGE LIMITED RESPONDENT

(Being an Appeal against the Judgment of the Hon.H. Nyakweba, delivered on 18th January 2022 in the Chief Magistrate's Court at Embu CMELRC Cause No.E001 of 2021)

JUDGMENT

1. By a Memorandum of Appeal dated 14th February 2022, the Appellant challenges the decision of the trial court (Hon. Nyakweba SPM) dated 20th January 2022 in Embu CMELRC No. E001 of 2021, Margaret Wanjiru Kibeti vs New Embu Uhuru Garage Limited, on the following grounds:
 - a. That the learned magistrate erred in law and fact in holding that despite the Claimant having tabulated her unpaid dues no evidence was led to prove some of the outstanding dues and that such part of the said dues could not be awarded.
 - b. That the learned magistrate grossly erred in law and in fact in failing to award unpaid housing and telephone allowance for the months of August, September, October, and November 2019 (Kshs. 15,000*4 months) amounting to Kshs. 60,000 though it was pleaded and proved in trial
 - c. That the learned magistrate grossly erred in law and in fact in failing to award the 21 days annual leave per year for 18 years @ Kshs. 1,961.60 per year amounting to Kshs. 726,364.00.
 - d. That the learned magistrate misdirected himself and erred in law and in fact in failing to award leave days for 1.75 days each month for 3 months amounting to Kshs. 10,088.40.



- e. That the learned magistrate erred in law and in fact by failing to award the 11 public holidays per year for 18 years @Kshs. 1,921.60 amounting to Kshs. 2,360,358.00
- f. That the learned magistrate erred in law and fact in failing to award service pay for 15 days per year for 18 years @ Kshs. 1921.60 amounting to Kshs. 3,218,670.00 as per section 35 of the Employment Act Cap 226.
- g. That the learned magistrate grossly erred in law and in fact in failing to award 12 months' salary compensation @57,650.00 amounting to Kshs. 7,182,581.20 as per section 49 of the Employment Act.
- h. That the learned magistrate erred in law and in fact in failing in disregarding part of the pleadings, part of the evidence and part of the submissions of the Appellant in arriving at her decision.

Background of the case

- 2. The Appellant was employed by the respondent as an Assistant Manager on 28th August 2001 for a monthly salary of Kshs. 35,000 per month. Due to his diligence service she was promoted to Manager and her salary was increased to Kshs.50,000. On 16th November 2019, her employment was terminated for no valid reason and without following due process as she was not served with prior notice or accorded any hearing. By then, her basic salary was allegedly Kshs.57650 and house allowance plus Telephone allowance of Kshs.15,000.
- 3. By a Memorandum of Claim dated 29th January 2021the appellant sued the Respondent seeking compensation of Kshs. 7,182,581.20 being compensation for unfair termination plus accrued employment dues. The Respondent did not file any response and on 29th June 2021 the trial court issued direction that the matter would proceed by way of formal proof.
- 4. After hearing the claimant's case trial Court entered the impugned judgment in favour of the claimant thus:
 - a. The termination of the appellant's employment was unlawful.
 - b. the Respondent to pay the Claimant the sum of KES. 50,650.00 being unpaid salary for the month of November 2019 and a further KES. 50,650.00 being one month's salary in lieu of notice.
 - c. Costs of the suit together with interest at court rates on (b) above from 16.11.2019 until payment in full.
- 5. The Appeal was canvassed by way of written submissions by the appellant but the Respondent did not participate in the Appeal.

Appellant's submissions.

- 6. The Appellant framed the following issues for determination by this Court:
 - i. Whether the learned magistrate grossly misdirected himself in failing to award unpaid housing and telephone allowance for the months of August, September, October, and November 2019 (Kshs. 15,000*4 months) amounting to Kshs. 60,000 though it was pleaded and proved in trial?
 - ii. Whether the learned magistrate grossly erred in law and in fact by failing to award the Claimant leave days?



- iii. Whether the learned magistrate erred in law and in fact by failing to award the 11 public holidays per year for 18 years @Kshs. 1,921.60 amounting to Kshs. 2,360,358.00?
 - iv. Whether the learned magistrate erred in law and fact in failing to award service pay for 15 days per year for 18 years @ Kshs. 1921.60 amounting to Kshs. 3,218,670.00 as per section 35 of the *Employment Act* Cap 226?
 - v. Whether the learned magistrate erred in law and in fact in failing to award 12 months' salary compensation @57,650.00 amounting to Kshs. 7,182,581.20 as per section 49 of the *Employment Act* CAP 226?
7. On the first issue, the Appellant submitted that section 31 of the *Employment Act* requires an employer to provide housing for his employee but in this case the Respondent did not. Further that, the employer failed to adduce employment records to prove that it paid house, and telephone allowance as required under sections 10 and 74 of the Act.
8. As regards the issue of leave days, the appellant relied on section 28 of the Act and the case of *Rajab Barasa & 4 Others versus Kenya Meat Commission* [2016] eKLR to submit that an employee is entitled to take leave. She further relied on section 74 of the Act to argue that, the failure by the Respondent to enter appearance and produce leave record, means that the claim for leave was uncontroverted and hence should be granted. She relied on the case of *Trevar Marambe v For You Chinese Restaurant* [2021] eKLR. She submitted that she worked on some public holidays and therefore she is entitled to the claim for compensation with respect to the public holidays worked.
9. As regards the issue of service pay, the Appellant submitted that under section 35 (5) (1) (c) of the Act she is entitled to the same on termination for every year worked.
10. The Appellant further submitted that she is entitled to compensation of 12 month's salary for wrongful termination as per section 49 of the *Employment Act* since she proved that she was unfairly terminated. She relied on the case of *Kenya Corporation vs Geoffrey Wakio* [2019] eKLR, *David Matanga Mbirika v Cosmopolitan Club* [2020] eKLR and the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment). In that regard, the Appellant urged the Court to allow the appeal as prayed.

Issues for determination and analysis

11. This being a first appellate Court my mandate is to re-evaluate the evidence on record and proceed to make my own independent conclusions. I gather support from the case of *Kenya Ports Authority versus Kuston (Kenya) Limited* (2009) 2EA 212, where the Court of Appeal stated as follows:
- “On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”
12. In the instant appeal, I have perused and considered the evidence contained in the record of Appeal together with the Supplementary Record of Appeal dated 27th July 2021. I have also considered the submissions by the Appellant. The issues falling for determination are:
- a. Whether the Appellant is entitled to compensation for unfair termination.
 - b. Whether the Appellant is entitled to claim for house allowance and telephone allowance



- c. Whether the appellant is entitled to the claim for accrued leave and holidays worked
- d. Whether the appellant is entitled to the claim for service pay.

Compensation for unfair termination

- 13. The Trial Court in the impugned judgment found that the Appellant's termination was unlawful and proceeded to grant one month's salary in lieu of notice. In the circumstances, the claimant was entitled to compensation under section 49(1) of the [Employment Act](#) unless the trial court had gave reasons for not awarding the same. The reason cited by the trial court for not awarding compensation was that the termination was on account of redundancy.
- 14. The Appellant's termination letter read as follows:

“Due to unresolved issues, we regret to inform you that your employment with the new Embu Uhuru Garage Ltd will be terminated with effect from 16th November 2019... we once again highly regret the inconvenience caused and sincerely appreciate your efforts for the many years we have served the company and seen it grow from one level to another.”
Emphasis added.
- 15. Section 45 of the [Employment Act](#) provides for requirements to be considered when determining whether termination was unfair thus:-
 - (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove –
 - a. That the reason for the termination is valid;
 - b. That the reason for the termination is a fair reason -
 - i. Related to the employee's conduct, capacity or compatibility, or
 - ii. Based on the operational requirements of the employer; and
 - c. That the employment was terminated in accordance with fair procedure.”
- 16. Fair procedure for termination of employment is provided under section 41 of the Act thus:
 - (1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
- 17. The above provisions of the law preclude employers from arbitrarily termination of their employees' employment. A careful reading of the termination letter shows that the Appellant was not given any reasons for the termination of her employment save for the alleged unresolved issues which were not also brought to her attention. If the employer intended to lay off the appellant, there was a clear



procedure for that, which was not followed. Defiance of the statutory procedure amounts to unfair termination and the emerging jurisprudence is that such employee is entitled to compensation for unfair termination. Consequently, I find and hold that the trial court erred in law by failing to award the appellant compensation for unfair termination.

18. Having so found, I award the appellant 12 months salary as compensation for unfair termination. In making the said award, I have considered the length of her diligent service of 19 years. I have also considered that the termination was abrupt and not caused by any misconduct on the part of the appellant. The award is based on the basic salary of 50,000 plus house allowance of 15% (Kshs. 7500). Hence Kshs 57500 x 19 years Kshs.1,092,500.

Claim for house allowance and telephone allowance

19. The promotion letter dated 1st November 2004, stated as follows regarding salary and allowances:

“The monthly salary will be Kshs.50,000 paid on monthly basis. This will be accompanied by telephone allowance, house allowance and travelling allowance that will be determined by the directors from time to time.”

20. The termination letter dated 15th November 2019 promised to pay the appellant her terminal dues including November salary, leave, telephone expenses allowances, house allowance and any other work benefits that relate to the termination. The said dues were not computed by the respondent and therefore the burden was on the appellant to plead and prove her entitlement on a balance of probabilities.
21. Having considered the evidence on record, the claim for telephone and house allowance is not substantiated. The promotion letter did not fix any amount and the appellant did not produce any evidence to show what amount was payable to her during the period claimed. However, the emerging jurisprudence from our courts on house allowance is that, where the same is not stated, the court will assess the same at the rate of 15% of the basic pay. I award the same to him for the period of service.
22. For the period between 2001 and 2004, the appellant’s basic pay was Kshs.35,000. Hence 15% of the same (Kshs.5250) for four years equals to Kshs. 21,000. The rest of the 15 years her house allowance was Kshs. 7500 equaling to Kshs. 112,500. The total house allowance awarded is Kshs. 133,500.

Accrued leave and holidays worked

23. The claim for leave is affirmed by the termination letter dated 15th November 2019. However, the appellant has not computed the actual claim based on her salary over the period of service. I will therefore compute the same based on the salary in the appointment and promotion letters. Under section 28 of the [Employment Act](#) she is entitled to a minimum of 21 days leave. From 2001 to 2004, her basic pay was Kshs.35000 hence she is awarded Kshs. 35,000 x 21/30 x 4 years = Kshs. 98,000. The rest of the 15 years her basic salary was Kshs. 50000 x 21/30 x15 years = Kshs. 525,000 making the total award Kshs. 623,000.
24. However, the claim for holidays worked lacks particulars and it must fail. The appellant stated in her testimony that she was sometimes on duty during public holidays but no particulars of the dates worked was given.

Claim for service pay

25. The appellant worked for 19 years and no evidence was adduced to prove that she was a member of her employer’s pension or gratuity scheme. There is also no evidence that the employer registered and



contributed towards any social security for the appellant. Consequently, she is entitled to service pay at the rate of 15 days' pay for every year worked based on the basic salary at the time of termination. Hence Kshs 50,000 x 15/30 x 19 = Kshs. 475,000

Conclusion

26. For the reasons highlighted above, I find that this Appeal is partially successful. Consequently, I hereby set aside the judgement of the Trial Court and substitute with the following reliefs:
- a. Compensation for unfair termination Kshs. 1,092, 500
 - b. House allowance Kshs. 133,500
 - c. Accrued leave Kshs. 623,000
 - d. Service pay Kshs. 475,000
Total Kshs. 2,324,000
 - e. Costs of this Appeal plus interest on a, b, c, and d above at court rates from the date of filing the appeal.
 - f. The award is subject to statutory deductions and in addition to award by the trial court.
 - g. Costs of the appeal.

DATED, SIGNED AND DELIVERED AT NYERI THIS 26TH DAY OF JANUARY, 2024.

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.

ONESMUS N MAKAU

JUDGE

