



**Wamukobole v Dawida Maternity & Nursing Home (Appeal
E013 of 2023) [2024] KEELRC 56 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 56 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E013 OF 2023
AK NZEI, J
JANUARY 25, 2024**

BETWEEN

DAVID LUBANGA WAMUKOBOLE APPELLANT

AND

DAWIDA MATERNITY & NURSING HOME RESPONDENT

*(Being an appeal from the judgment of Hon. Sinkiyian – SRM delivered
at Voi on 6th September 2022 in Voi CMCC ELR Case No. 1 of 2021)*

JUDGMENT

1. The Appellant herein was the Claimant in Voi Chief Magistrate’s Court Employment Case No. E015 of 2021, whereby he had sued the Respondent herein vide a Memorandum of Claim dated 22nd December 2021 claiming:-
 - a. one-month salary in lieu of notice-----Kshs. 35,000
 - b. 11 days’ salary for the month of October 2021----Kshs. 12,833.70
 - c. unpaid salary balance for the month of August 2021--Kshs. 15,000
 - d. unpaid salary for the month of September 2021-----Kshs. 35,000
 - e. severance pay $15 \times 1166.70 \times 1.5$ -----Kshs. 26,250.75
 - f. unlawful termination $35,000 \times 12$ -----Kshs. 420,000
 - g. unpaid leave for 18 months
 - i. $21 \times 1166.70 \times 1$Kshs. 24,500
 - ii. $1.75 \times 1166.70 \times 6$Kshs. 12,250



- h. costs and interest.
 - i. any other relief that the Court may deem fit to award.
2. The Appellant pleaded in the trial Court that he was, at all times material to the suit, an employee of the Respondent; working as a registered Clinical Officer and stationed in the Respondent's Voi branch, having been employed with effect from 4th March 2020. It was the Appellant's pleading that he performed his duties diligently from 4th March 2020 upto 11th October 2021 when the Respondent terminated his employment. That the termination was wrongful, unlawful, and unfair as no reasons were given.
 3. It was the Appellant's further pleading that he was earning a basic salary of Kshs. 35,000 at the time of termination, and that he was not paid for his leave days during the period of employment.
 4. Documents filed by the Appellant in the trial Court alongside the Memorandum of Claim was the Claimant's written witness statement and a list of documents dated 22nd December 2021, listing 9 documents. The listed documents included the Appellant's Identity Card, letter of offer dated 4th March 2020, demand letter dated 4th December 2021, response to demand letter dated 9th December 2021, certified copy of the Appellant's M-pesa statement, NSSF Card, a NHIF Card, copy of the Appellant's Clinical Officer's Card and a copy of the Appellant's NSSF statement.
 5. The Respondent entered appearance and filed response to the Appellant's claim on 26th January 2022. The Respondent denied the Appellant's claim and termed it baseless, frivolous and without basis. While admitting to having employed the Appellant, the Respondent denied having terminated his employment; and stated that it was the Appellant who abandoned work without leave and/or notice, and that the Appellant was earning Kshs. 35,000 per month.
 6. The Respondent also filed a written witness statement of Briston Mbogholi Mwalimo, the Respondent's Chief Executive Officer, dated 26th January 2022.
 7. Trial is shown to have opened on 7th April, 2022. The Appellant testified that he had been employed by the Respondent on 4th March 2020 until October 2021; earning Kshs. 35,000 per month. That he was dismissed on 11th October 2021 without any notice, warning or reason. That there was an allegation that the Appellant was reporting to work late; but there was no warning in that regard. The Appellant denied having absconded duty.
 8. The Appellant stated that he used to be deducted money for NSSF, but no remittances were made. That his salary for August, September and October 2021 was delayed and was paid in bits. That the Appellant never got leave, that he only took off days. That the employment contract was signed on 10th March 2020 though the Appellant had started working on 4th March 2020. He produced in evidence the documents referred to in paragraph four (4) of this Judgment. The Appellant further testified that his salary used to be paid both in cash and by M-pesa. That he would sign for the cash payments.
 9. Cross-examined, the Appellant testified that he was dismissed verbally, and denied having absconded duty or reporting on duty late. That he was owed by the Respondent 11 days' unpaid salary for October 2021, Kshs. 15,000 for the month of August 2021 and Kshs. 35,000 for September 2021. That he worked for a period of 18 months (one year and six months), and was terminated unlawfully.
 10. The Respondent called one witness, Briston Mbogholi Mwalimo (DW-1). He adopted his filed witness statement as his testimony and further testified that he was informed that the Appellant had absconded duty. That on 13th October 2021, DW-1 paid the Appellant Kshs. 35,000 by M-pesa being salary arrears for September 2021 and that on 15th October 2021, he sent to the Appellant Kshs. 20,000 as he thought



- that the Appellant had absconded duty due to unpaid salary arrears. That the Kshs. 20,000 was an advance payment for October 2021, and Kshs. 10,000 was paid at the end of that month. That the Respondent did not owe the Appellant anything as he left employment on his own. That the Appellant should pay back the Kshs. 20,000 for October 2021, which he did not work for. That the Appellant was not registered with NSSF, and that as such no deduction was made from his salary in that regard. That the Appellant did not take some leave days, but was paid in lieu.
11. Cross-examined, DW-1 testified that the Appellant reported to work late, insulted other employees, and absconded duty, though the incidences had not been recorded. That the Appellant was entitled to 21 leave days as he had completed a year in service, but had absconded before the same could be processed. That the Appellant had only taken off days.
 12. The trial Court delivered its Judgment on 6th September 2022 and awarded the Appellant:-
 - a. Kshs. 15,000 being unpaid salary arrears for August 2021.
 - b. Kshs. 35,000 being unpaid salary balance for September 2021, and
 - c. Kshs. 36,750 being payment for unpaid leave days during the 18 months worked.
 13. The rest of the Appellant's claim was dismissed, and each party was ordered to bear its own costs.
 14. Aggrieved by the said Judgment, the Appellant preferred the present appeal and set out the following grounds of appeal:-
 - a. that the learned Magistrate erred in law and in fact by deciding that the Claimant failed to prove his claim, thus dismissing the same.
 - b. that the learned Magistrate erred in law and in fact by failing to consider that the testimony of the Appellant was on oath and the same was tested by way of cross-examination by the Respondent's Advocates.
 - c. that the learned Magistrate erred in law and in fact by deciding that by the Claimant failing to state in his pleadings how the verbal termination was done, he denied the Respondent a chance to call evidence.
 - d. that the trial Magistrate erred in law and in fact by deciding that the Claimant failed to prove his claim for unlawful termination despite evidence supporting his claim being tendered in Court.
 - e. that the trial Magistrate erred in law by failing to consider the Claimant's submissions and the authorities cited.
 15. The Appellant sought the following reliefs on appeal:-
 - a. that the appeal be allowed, and the trial Court's Judgement be set aside.
 - b. that Judgment be entered for the Appellant against the Respondent.
 - c. that costs of the appeal and of the suit be borne by the Respondent.
 - d. any other relief that this Honourable Court may deem just to grant.
 16. It is to be noted that the reliefs granted to the Appellant by the trial Court as set out in paragraph 12 of this Judgment (being salary arrears for August and September 2021 and unpaid leave days) were part of reliefs sought by the Appellant in the trial Court. The said awards of Kshs. 15,000, 35,000 and Kshs. 36,750 respectively are hereby upheld.



17. Having stated that, I hold the view that issues that present for determination are as follows:
 - a. whether the Appellant's employment was terminated by the Respondent.
 - b. whether termination of the Appellant's employment was unfair.
 - c. whether the Appellant is entitled to the reliefs that the trial Court declined to grant.
18. On the first issue, it was a common ground that the Appellant was employed by the Respondent on 4th March 2020, and that his monthly salary was Kshs. 35,000. It was also a common ground that the Appellant left employment on 11th October 2021. The Appellant pleaded and testified that he was verbally terminated/dismissed by the Respondent (DW-1), and that the termination was unfair, and was without notice or warning. On his part, DW-1 testified that the Appellant absconded duty.
19. The trial Court disregarded the Appellant's evidence that he was verbally dismissed by DW-1, the Respondent's Chief Executive Officer, and stated that the Appellant had failed to give evidence as to how, and the facts he relied on to state that he had been unlawfully dismissed from employment. That he failed to particularize that basis in his claim even after the Respondent's response was filed.
20. It was never disputed by the Respondent that the Appellant left employment on 11th October 2021. What was disputed was how he left. The Appellant testified that he was verbally dismissed/terminated, while the Respondent testified that the Appellant absconded duty. It was the Appellant's word against the Respondent's (DW-1's) word. The Respondent did not, however, tell the Court what disciplinary action he took against the Appellant after he allegedly absconded duty.
21. It is to be noted that absconding duty is a gross misconduct under Section 44(4)(a) of the [Employment Act](#), 2007, and may justify summary dismissal of an employee. An employer who alleges that an employee absconded duty must demonstrate what action and/or disciplinary action he took against the absconding employee. The employer has a higher legal duty under such circumstances.
22. It was held as follows in the case of *Godfrey Anjere vs. Unique Supplies Limited* [2015] eKLR:-

“In a dismissal on account of absconding duties, the employer is required to show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for lawful or reasonable excuse such as illness or circumstances beyond their control, and yet unable to communicate to the employer in good time.”
23. Further, it was held as follows in *Stanley Omwoyo Oncheri vs. Bom Nakuru YMCA Secondary School* [2015] EKLR; cited in *James Ashiemi Namayi vs. Menengai Oil Refineries Ltd* [2016] eKLR, that:-

“The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable enquiries as to the absence (post, email, phone calls, colleagues, family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances.”
24. In the present case, the Respondent did not demonstrate what action it/he took after the Appellant allegedly absconded duty. All that DW-1 told the trial Court was that he sent salary arrears to the Appellant (by M-pesa) because he thought that salary delays was what had made the Appellant not to report on duty. It is worthy noting that the Appellant testified that the Respondent paid his salary either in cash or by M-pesa.



25. On a balance of probability, and in view of the evidence on record, I find and hold that the Appellant's employment was, indeed, terminated by the Respondent. DW-1 testified before the trial Court that the Appellant used to report on duty late and to leave before the other employees, though no warning was issued to him; and that he was rude, and insulted other employees. No evidence was, however, presented in support of those allegations by DW-1.
26. On the second issue, it is my finding that termination of the Appellant's employment was unfair. He was not given a termination notice under Section 35(1)(c) of the Employment Act, and the Respondent did not demonstrate that it had a valid reason for terminating the Appellant's employment. Under Section 43(1) of the Employment Act, termination of an employee's employment is unfair if the employer fails to prove validity of the reason or reasons for the termination.
27. On the third issue, and having found that termination of the Appellant's employment was unfair, I award the Appellant the equivalent of seven months' salary as compensation for unfair termination of employment. That is Kshs. 35,000 x 7 = Kshs. 245,000.
28. The claim for one-month salary in lieu of notice is allowed, and the Appellant is awarded Kshs. 35,000 in that regard.
29. The claim for Kshs. 12,833.70 being salary for 11 days worked in October 2021 is declined as the Appellant did not rebut the Respondent's assertion that the same was paid. The claim for service pay (gratuity) is declined as payment of the same was not a term in the Appellant's contract of employment, and had not been contractually fixed pursuant to Section 35(5) of the Employment Act. The claim for a certificate of service is allowed pursuant to Section 51(1) of the Employment Act.
30. In sum, and having considered written submissions filed on behalf of the parties herein, the Appellant's appeal partly succeeds, and the trial Court's Judgment is hereby set aside to the extent set out in this Judgment.
31. For avoidance of doubt, Judgment is hereby entered for the Appellant against the Respondent as follows:-
 - a. Amount awarded by the trial Court and upheld by this CourtKshs. 86,750
 - b. Compensation for unfair termination of employment-.....Kshs. 245,000
 - c. 1-month salary in lieu of notice.....Kshs. 35,000

Total Kshs. 366,750
32. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
33. The Respondent shall issue a Certificate of Service to the Appellant pursuant to Section 51(1) of the Employment Act within thirty days of this Judgment.
34. The Claimant is awarded costs of the appeal and of proceedings in the Court below. The Appellant is also awarded interest at Court rates, to be calculated from the date of this Judgment.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 25TH JANUARY 2024

AGNES KITIKU NZEI



JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

