



**Endmor Steel Millers Ltd v Mburu (Appeal E14 of 2022)
[2024] KEELRC 9 (KLR) (23 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 9 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E14 OF 2022
JK GAKERI, J
JANUARY 23, 2024**

BETWEEN

ENDMOR STEEL MILLERS LTD APPELLANT

AND

JOHN NGOTHO MBURU RESPONDENT

*(This is an appeal from the judgement of Hon. Stephen Jalang'o delivered
on 17th March, 2022 at Mavoko in CMEL Cause No. 98 of 2019)*

JUDGMENT

1. This is an appeal from the judgement of Hon. Stephen Jalang'o delivered on 17th March, 2022 at Mavoko in CMEL Cause No. 98 of 2019 *John Ngotho Mburu v Endmore Steel Millers Ltd.*
2. A brief background of the case is that the Claimant alleged to have been employed by the Respondent in September 2012 and worked until 2019 when his employment was terminated.
3. He admitted on cross-examination that he was a casual labourer and worked continuously except in 2015. He could not recall if he worked in 2016. He admitted that he was not at work on 30th April, 2019 and was called upon to explain and alleged to have been dismissed 2 days later yet he admitted that he did not return to the work place after 30th April, 2019.
4. The Claimant alleged that his salary was Kshs.36,000/= per month, paid via Mpesa but did not file any record. He admitted that this was his own calculation.
5. According to the Respondent, the Claimant was employed on 21st August, 2015.
6. The Respondent availed records of the Claimant's attendance and admitted that the Claimant worked from 21st August, 2015 to October 2015 and deserted duty, resumed in August 2016. He was called and resumed duty but deserted again in April 2019 as he was a habitual deserter.



7. The Claimant prayed for notice pay, house allowance, leave days and 12 months compensation.
8. The learned trial Magistrate found that the termination of the Claimant's employment was unfair for want of procedural propriety as the Respondent had not complied with the provisions of Section 41 of the [Employment Act](#), 2007.
9. The court awarded notice pay of Kshs.13,714/=, found that the Claimant's salary was consolidated and the Claimant had been paid for leave days and entered judgement in favour of the Claimant for the sum of Kshs.150,854/= being notice pay and 12 months' salary for unfair termination with costs.
10. Subsequently, the Claimant sought a review of the judgement for purposes of correction of arithmetic errors and/or mistakes in the judgement on the basis that the Claimant's salary was Kshs.36,000/= and by a ruling delivered on 4th August, 2022, the trial court reviewed the judgement accordingly and award the sum of Kshs.468,000/=.
11. This is the judgement appealed against by the Respondent/Appellant which faults the trial Magistrate in the following ways;
 - i. Failure to properly evaluate the written submissions of the appellant and evidence on record.
 - ii. Failing to take cognizance that the Claimant was not constructively dismissed by the appellant but deserted duty and there was no evidence of constructive dismissal.
 - iii. The court erred in awarding 12 months compensation contrary to the evidence on record.
 - iv. The trial Magistrate erred in law and fact in finding that the Claimant had proved his case for unfair termination.
 - v. The court erred in awarding the Claimant Kshs.36,000/= as notice pay yet his daily rate was Kshs.703.84 and was a casual labourer.
 - vi. Failure to evaluate the evidence on record and in particular that of the Claimant.
12. These grounds may be condensed into four, namely; failure to evaluate evidence on record, burden of proof, salary and compensation.

Appellant's submissions

13. Counsel did not isolate specific issues but submitted on Respondent's pleadings on constructive dismissal, Claimant's salary and evidence on record.
14. On pleadings, counsel submitted that parties are bound by their pleadings and as the Respondent had pleaded constructive dismissal but adduced no evidence to prove his case, the suit was unsustainable.
15. Reliance was made on the decision in [Milton M. Isanya v Aga Khan Hospital Kisumu](#) (2017) eKLR to underscore the essence of constructive dismissal and its application.
16. Counsel submitted that there was no evidence of termination of employment as the Respondent did not provide a letter to that effect and the Claimant's employment was not unfairly terminated.
17. The decision in [Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services](#) (2021) eKLR was cited to buttress the submission that the Claimant absconded duty.
18. Counsel urged the court to find that the Respondent was neither constructively dismissed nor terminated from employment.



19. As regards the Claimant's salary, counsel submitted that there was no evidence to support the Claimant's allegation that his salary was Kshs.36,000/= as he had no Mpesa statements. That at a daily rate of Kshs.703.84, the Claimant's salary was Kshs.21,115.20 per month as he was a casual labourer.
20. That the Claimant absconded duty after he failed to explain the loss of manganese at his work station.
21. According to counsel, the Claimant's evidence consisted of falsehoods and the trial Magistrate's conclusions had no supportive evidence.
22. Reliance was made on the holding in *Robert Indiazzi V Tembo Sacco Ltd* (2018) eKLR to reinforce the submission.
23. Counsel urged the court to allow the appeal.

Respondent's Submissions

24. Counsel isolated three issues for determination, namely; whether the Claimant was a casual employee, whether the case before the court was one of constructive dismissal, whether the trial Magistrate erred in his finding and the reliefs awarded by the trial Magistrate.
25. As regards the nature of employment, counsel submitted that the Claimant was not a casual employee as he worked from August 2016 to April 2019 about 3 years and even if he was initially a casual employee, he transitioned pursuant to the provisions of Section 37 of the *Employment Act, 2007* as he worked continuously and was thus entitled to leave, house allowance and National Social Security Fund remittances.
26. Reliance was made on the holding in *Esther Njeri Maina V Kenyatta University* (2020) eKLR.
27. Counsel relied on the National Social Security Fund statement on record to urge that the remittances were continuous.
28. On constructive dismissal, counsel submitted that the case before the court was not one of constructive dismissal as the Claimant did not resign. According to counsel, the trial Magistrate did not err on this issue.
29. As regards desertion as alleged by the Respondent, reliance was made on the sentiments of the court in *Ronald Nyambu Daudi v Tornado Carriers Ltd* (2019) eKLR and *Boniface Nkubi Karaganian v Protective Custody Ltd* (2019) eKLR to submit that the appellant had not proved that the Respondent deserted the workplace.
30. That the Claimant testified that he was dismissed by the Respondent's Human Resource Manager by word of mouth.
31. On reliefs, counsel urged that since the employer availed no records of employment as by law required to controvert the Claimant's claim on the salary, the sum of Kshs.36,000/= was the Claimant's salary.
32. Counsel, finally submitted that having found that Respondent's employment was unfairly terminated, the court could award the relief under Section 49(1)(c) of the *Employment Act, 2007* and there was no reason for the court to interfere with the award.



Determination

33. The duty of a first appellate court, as correctly submitted by the appellant's counsel is well settled and has been articulated in legions of decisions such as *Selle v Associated Motor Boat Co. Ltd* (1968) EA 123 where the Court of Appeal stated as follows;

“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 consider 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 to trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities . . .”
34. As adverted to elsewhere in this judgment, the appellant faults the trial Magistrate's judgement on pleadings, evidence, salary and compensation.
35. As regards pleadings, it is trite law, a correctly submitted by the appellant's counsel that a party is bound by its pleadings. (See *Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Andetuon Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002).
36. Although paragraphs 9 and 11 of the Respondent's statement of claim make reference to constructively dismissal, the preamble to the statement of claim as well as paragraphs 4, 6, 7 and 15(a) are unambiguous that the Claimant's case is grounded on unfair termination of employment.
37. Similarly, the facts pleaded in paragraph 6 postulate the claims case.
38. More significantly, the learned trial Magistrate relied on the provisions of Section 41 and 45 of the *Employment Act*, 2007 and made no finding of fact that the Claimant's employment was constructively terminated.
39. The trial court found that the “termination of the Claimant was both procedurally and substantively unfair” (paragraph 26).
40. In the court's view, the fact that Claimant pleaded constructive dismissal in 2 paragraphs and unfair termination in the rest of the paragraphs, led no evidence to establish the constructive dismissal but adduced evidence which convinced the trial court that he was unfairly terminated from employment cannot deny him the reliefs available in cases of unfair termination of employment.
41. The foregoing disposes grounds 2 and 3 of the Memorandum of Appeal.
42. As to whether the learned trial Magistrate evaluated the evidence and came to the right conclusion, the court proceeds as follows;
43. One of the issues the trial court did not address is the Claimant's nature of employment but which in the court's view did not affect the judgement significantly.
44. Based on the evidence adduced in court, it is clear that although the Respondent alleged to have been employed in September 2012, he had no employment letter to prove the date of employment.
45. However, the NSSF statement on record reveals that the Respondent joined the appellant in 2012 as alleged.



46. On cross-examination, the Respondent admitted that he was a casual labourer but gave contradictory evidence as to how he rendered services between 2015 and 2016.
47. The appellant's evidence that it employed the Respondent on 21st August, 2015 is equally unreliable as it had no supportive evidence.
48. Significantly, the appellant adduced no synthesised evidence of the Claimant's attendance from 2015 to 2019 but availed raw attendant records with the respective dates inserted by hand while other pages had no dates.
49. It is unclear to the court whether John Ngotho Mwangi and John Ngotho Mburu refers to the same person as on page 19, the name is changed by hand to read John Ngotho Mburu as opposed to John Ngotho Mwangi and from page 45 the name changes to John Ngotho Mburu.
50. RWI adduced no evidence whether the two names referred to the same person or who changed the name on page 19.
51. A panoramic view of the attendance sheets leaves no doubt that the Respondent rendered services intermittently from August 2015 to sometime in 2016.
52. However, the NSSF statement on record dated 17th September, 2019 reveals that the appellant remitted the Respondent's NSSF dues consistently from August 2016 till August 2019 which would appear to suggest that the Respondent rendered services consistently.
53. The attendant records from 2nd May, 2019 reveal that the Respondent did not present himself at the work place after 31st April, 2019.
54. Documentary evidence availed by the Respondent show that although the Claimant was initially employed as a casual employee, he rendered services continuously from August 2016 until the two separated in April 2019.
55. Needless to belabour, the court is in agreement with the Respondent Counsel's submission that the Claimant transitioned from casual to term employment by virtue of the provisions of Section 37 of the *Employment Act*, 2007 and was entitled to all attendant rights such as leave as evidenced by the Respondent's documentary evidence which reveal that the Claimant was paid for leave in 2016, 2017 and 2018, evidence the Claimant did not controvert.
56. The court is in agreement with the sentiments of the court in *Esther Njeri Maina V Kenyatta University (Supra)* cited by the Respondent's counsel.
57. Contrary to the appellant's counsel's submissions that the trial Magistrate erred on this issue, it is the finding of the court that the trial court did not err on the nature of the Claimant's employment.
58. As regards the Claimant's salary, neither of the parties adduced credible evidence as to the salary payable or paid to him. The Claimant assessed it at Kshs.36,000/= but availed no evidence as to how he arrived at that figure.
59. The appellant pleaded that it paid the Respondent Kshs.703/= as per the relevant Regulation of Wages Order but tendered no evidence as to the amount it paid from 2012 to 2019.
60. Section 74(1) of the *Employment Act*, 2007 obligates the employer to keep written records of all employees and such records must contain particulars of the salary paid, statutory deductions, working hours etc.
61. The appellant was required to give the Claimant an itemised pay statement.



62. For unexplained reasons, the appellant neither kept nor maintained employee records and was thus unable to controvert the Claimant's evidence that his monthly salary amounted to Kshs.36,000/=.
63. In the circumstances, the court is not persuaded that the trial court erred on the Claimant's salary.
64. A more problematic issue is how the Respondent and the appellant separated.
65. While the Respondent alleges that his employment was terminated by word of mouth on a Monday, the appellant maintains that the Respondent deserted the workplace in May 2019.
66. From the evidence on record, it is discernible that the Respondent rendered no services from May 2019. The statement of claim and the written statement are consistent on this fact, his contradictory oral testimony notwithstanding.
67. If the Claimant's testimony is to be believed, the Human Resource Manager, one Mr. Mureithi raised the issue of the presence of Manganese at the Respondent's work station on 30th April, 2019 and told him to go home on a Friday and report on Monday.
68. Since 30th April, 2019 was a Tuesday, it is unclear what Monday the Claimant is referring to when he was allegedly dismissed as he was not at work on 6th May, 2019 as records reveal and more importantly, he admitted on cross-examination that he did not return to the workplace after 30th April, 2019.
69. On the other hand, the Respondent maintains that the Claimant absconded duty and RWI confirmed, on cross-examination that the Claimant absconded duty from May 2019 and his employment was not terminated.
70. Copies of attendance records provided by the appellant show that the Respondent did not report to the workplace from 2nd May, 2019 and more significantly, the Claimant admitted in court that he did not return to the work place from Tuesday 30th April, 2019, a patently clear case of desertion.
71. The Claimant made a conscious decision not to report to the workplace after Mr. Mureithi allegedly accused him of theft.
72. The court is guided by the sentiments of Ndolo J. in *Ronald Nyambu Daudi v Tornado Carriers Ltd (Supra)* as follows;

“Desertion of duty is a grave administrative offence, which if proved would render an employee liable to summary dismissal . . .”
73. The fact that the appellant did not reach out to the Claimant or issue a notice to show cause cannot avail the Respondent, in the court's view as he admitted that he deserted the workplace.
74. Before concluding this issue, it is crucial to interrogate the Respondent's evidence on the alleged termination of his employment by Mr. Mureithi.
75. The written statement states that on 30th April, 2019, Mr. Mureithi accused the Respondent of theft due to the presence of manganese in his work station and told him “to go home the following Friday and come back on Monday”.
76. As April 30th 2019 was Tuesday, it is unclear of the Friday and Monday made reference to.
77. On cross-examination, the Claimant testified that he returned on a Monday, was given a report at noon and told that he had been dismissed.



78. Strangely, the Respondent did not avail the alleged investigation report. It is also unclear as to who gave him the report.
79. Puzzlingly, the alleged Monday after 30th April, 2019 had no date as it fell in May and the Claimant did not report to the workplace from May 2019 as he confirmed and as testified by the appellant's witness.
80. A careful evaluation of the Respondent's evidence on what transpired after 30th April, 2019 reveals nothing but contradictions and inconsistencies as submitted by the appellant's counsel.
81. It is unfathomable how the appellant's Human Resource Manager terminated the Respondent's employment on an undated Monday after 30th April, 2019, yet the Respondent and the appellant's evidence is consistent that the Respondent did not return to the workplace after 30th April, 2019.
82. The testimony on the alleged verbal dismissal from employment, in the court's view, lacks credibility and is thus unsafe to rely on.
83. An in-depth evaluation of the written statement against the oral testimony adduced in court would have revealed the Respondent's contradictory and inconsistent nature of the Respondent's testimony. In the court's view, there was neither a report nor verbal dismissal.
84. In the circumstances, the court is in agreement with the appellant counsel's submission that the learned trial Magistrate erred in law and fact in holding that the Respondent had established his claim for unlawful and unfair dismissal on a balance of probabilities.
85. This finding disposes of grounds 2, 5, 8 and 9 of the Memorandum of Appeal.
86. This finding renders the issue on compensation not amenable to determination.
87. Having found that the Respondent absconded duty and was not unfairly terminated from employment by the appellant, the Respondent's statement of claim dated 13th August, 2019 was unsustainable and the appeal herein is allowed.
88. Consequently, the judgement of the Honourable Court in Mavoko CMEL No. 98 of 2019 in *John Ngotho Mburu v Endmore Steel Millers* as reviewed, is hereby set aside in its entirety.
89. Parties shall bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 23RD DAY OF JANUARY 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty



of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

