



**Mombasa Coffee Limited v Shuke (Appeal E075 of 2022)
[2024] KEELRC 444 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 444 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E075 OF 2022
AK NZEI, J
FEBRUARY 29, 2024**

BETWEEN

MOMBASA COFFEE LIMITED APPELLANT

AND

MTENZIE MWAGAMBO SHUKE RESPONDENT

*(Being an appeal from the judgment of Hon. D.O. Mbeja – PM dated
30th September 2022 in CM-ELR Cause No. E150 of 2031)*

JUDGMENT

1. This is an appeal against the judgment of D.O. Mbeja (Principal Magistrate) delivered on 30/9/2022 in Mombasa Chief Magistrate’s Court Employment Case No. E151 of 2021 awarding the Respondent herein, being the claimant in the said suit, a sum of kshs. 1,159,432.95. The Respondent had sued the Appellant in the said suit and had pleaded that he had been employed by the Appellant on 30/7/2004 as a day guard earning a monthly salary of kshs. 9,200, and that he retained continuous employment until 14/5/2020 when his employment was terminated.
2. The Respondent had pleaded:-
 - a. that in early April 2020, his wife fell seriously ill and he sought 4 days’ leave to attend to her, but was instead given 2 weeks by the Appellant’s General Manager, a Mr. Ali Ahmed, and that on returning back to work on 23/4/2020, the said General Manager directed him to take another week and to report to work on 30/4/2020. That on returning to work on 30/4/2020, the said General Manager send him back home and told him to report back on 14/5/2020.
 - b. that on reporting to work on 14/5/2020, the Respondent’s said General Manager (Mr. Ali Ahmed) informed him that the company had reached a decision to terminate his services, but was not informed of the reasons for his termination.



- c. that the respondent was underpaid during the period of employment, was not allowed weekly rest days, never took leave, never observed public holidays as stipulated by the law and worked beyond the stipulated working hours; from 7.00am to 11.00pm (approximately 7 hours overtime) per day and seven days a week.
 - d. that termination of the Respondent's employment was unfair, unprocedural and unlawful as Sections 35,41,43,44 and 45 of the Employment Act, and Article 41 of the Constitution were not adhered to.
 - e. the Respondent was not notified of the impending termination/discharge and was not accorded a hearing before dismissal.
3. The Respondent had sought the following reliefs against the Appellant:-
- a. One month salary in lieu of noticeksh. 13,572.90
 - b. Unpaid leave for the period between 30/7/2004 to 30/7/2019 (21 days x kshs. 13,571.90/26 days)x14 years ...ksh. 164.430
 - c. Unpaid 9 months' pro-rata leave from August 1/8/2019 to 31/4/2020 (21 days x kshs. 522x9 months/12 months).....ksh. 8,221.50
 - d. House allowance for months of 30/7/2004 to 30/4/2020 (15% of kssh. 13,572.90=kshs. 2,035.80)..kshs. 80x189 monthsksh. 384,766.20
 - e. Gratuity pay having worked as a day guard for more than 15 yearsksh. 140,940.
 - f. Unpaid public holidays.....ksh. 78,300
 - g. Underpayment between 1/5/2013 to 31/4/2015(ksh. 9,780-9,200= ksh. 580.95x23 months.....ksh. 13,361.85
 - h. Underpayment of the period from 1/5/2015 to 31/4/2017 (kshs. 10,954.70-9,200=ksh. 1,754.70)x23 monthsksh. 40,358.10
 - i. Underpayment from 1/5/2017 to 31/4/2018 (kshs. 12,926.55-9,200= kshs. 3,726.55)x12 months ...ksh. 44,718.60
 - j. Underpayment from 1/5/2018 to 31/4/2020 (kshs. 13,572.90-9,500=kshs. 4,772.90)x12 months....kshs. 57,274.80
 - k. Overtimeksh. 604,280.25
 - l. Compensation for unfair termination of employment (ksh.13,572.90x12 months)ksh. 162,874.80
- Kshs.1,713,099
- m. A declaration that the Respondent's termination was unfair and unjust.
 - n. Issuance to the respondent of a certificate of service.
 - o. Costs of the claim and interest at Court rates.
 - p. Any other or further relief as the Court may deem just.



4. Documents filed by the Respondent in the trial Court alongside his memorandum of claim dated 26/2/2021 included the Respondent's written witness statement dated 26/2/2021 and an evenly dated list of 9 documents. The listed documents included the Respondent's identity card, the Respondent's gate pass, the Respondent's NSSF statement for the period 1/10/2009 to 30/4/2020; and Legal Notice Nos. 24 of 1998, 197 of 2013, 117 of 2015, 112 of 2017 and 2 of 2018. Also listed was a demand notice dated 10/2/2021.
5. The Appellant entered appearance on 24/3/2021 and subsequently filed its Response, denying the Respondent's claim and putting him to strict proof of the same.
6. The Appellant further averred:-
 - a. that the Respondent left work at the beginning of Easter holidays on 2020 and did not return after the holidays, and did not contact the Appellant to seek leave to be away from work; and only returned on 7/5/2020 and informed the Appellant that he was ready to work in any department.
 - b. that as at the time the respondent returned to work, the Appellant had engaged a professional company for provision of security services, effectively replacing the respondent, and that the Appellant offered the Respondent an alternative employment as a cleaner.
 - c. that the Respondent gladly accepted the job, but abandoned it after working for an hour, upon which he was given the job of a tea packer, which he abandoned without a word.
 - d. that the Respondent never returned since abandoning his work.
 - e. that the Appellant operates 6 days a week and closes at 5.00 O'clock, and that no employee works beyond that time.
 - f. that the Respondent, just like all other employees, was accorded annual leave, and was never required to work during national holidays as the Appellant's premises are closed during such times.
 - g. that the Respondent abandoned his work without giving notice; and that he is not entitled to any of the particularized dues.
 - h. that the Respondent's salary included pro-rated leave pay and was consolidated, and that his employment contract did not provide for gratuity.
7. The Appellant listed 3 witnesses, these being Ali Ahmed, Said Abeid and Said Ahmed, but filed witness statements of Ali Ahmed and Said Abeid, both dated 5/5/2021. A supplementary witness statement of Ali Ahmed, dated 30/8/2021, was also filed.
8. The Appellant also filed a list of documents dated 30/8/2021, listing 2 documents. The listed documents were a police abstract on loss, theft and breakages dated 1/10/2020, and a statement from Mombasa County Government Fire Department.
9. The Respondent filed a Reply to the Appellant's Response on 25/6/2021, and joined issues with the Appellant.
10. At the trial, the Respondent, being the claimant in the primary suit, adopted his filed witness statement as his testimony, and reiterated the averments made in the memorandum of claim, which are substantially reproduced at paragraphs 2 and 3 of this judgment. The Respondent further testified that he did not have a contract of employment, that the Appellant company worked from Monday to



Saturday but the Respondent worked from Monday to Sunday as a guard and used to report at 7am, that there was no specific time to leave, and that he worked for extra hours.

11. The Respondent further testified that he was paid ksh. 9,200 and was paid in cash. He further testified that he never went on leave. The Respondent denied being at work on 7/5/2020.
12. Cross-examined and re-examined, the Respondent testified that he was paid kshs. 9,200 and was paid in cash, and that he did not receive house allowance, that there was no agreement that he would be paid gratuity, and that he was never given any agreement.
13. The Appellant is shown to have called one witness, Ali Ahmed sheikh (RW-1). The witness adopted his witness statement dated 30/8/2021 as his testimony. The said witness statement substantially replicates the averments made in the Appellant's Response to the claim. The witness further testified that there had been a declaration of "no movement" at the material time. That they tried to call the Respondent and he came on 7/5/2020. That this was during the lock down. That the Respondent was paid a consolidated salary, was not terminated and was not underpaid. That the Respondent's salary was above the minimum.
14. Cross-examined and re-examined, RW-1 testified that he did not know how much the Respondent was being paid in salary. The witness admitted having given the respondent two weeks, and that this was during corona time. That the Respondent was never called for a disciplinary hearing. That there was no proof that the respondent had been called; and that there was no proof that the Respondent had been re-deployed.
15. The trial Court delivered its judgment on 30/9/2022, making a finding of unfair termination, and awarding the Respondent the equivalent of 10 months' salary as compensation for unfair termination of employment. The Court also awarded the Respondent kshs. 13,572.90 being payment in lieu of notice under Section 35 of the *Employment Act*, ksh. 164,430 for accrued and untaken leave kshs. 8,221.50 being pro-rated leave, kshs. 385,766 being unpaid house allowance, ksh. 155,713.3 regarding the claim for underpayment and ksh. 300,000 for overtime worked.
16. Aggrieved by the said judgment, the Appellant preferred the present appeal and set forth the following grounds of appeal:-
 - a. the learned magistrate erred in law and in fact in holding that the claimant was unfairly terminated when evidence given showed that the claimant absconded from duty on several occasions.
 - b. the learned magistrate erred in law and in fact in applying the wrong principles while awarding salary in lieu of notice, kshs. 13,572.90.
 - c. the learned magistrate erred in law and in fact in applying the wrong principles while awarding ksh. 164,430 as leave for 16 years inspite of evidence that leave was taken.
 - d. the learned magistrate erred in law and in fact in applying the wrong principles while awarding ksh. 384,766 as house allowance inspite of evidence that Claimant was paid gross consolidated salary.
 - e. the learned magistrate erred in law and in fact in applying the wrong principles while awarding ksh. 155,713.35 as underpayment.
 - f. the learned magistrate erred in law and in fact in applying the wrong principles while awarding ksh. 300,00 as overtime.



- g. The learned magistrate erred in law and fact in applying the wrong principles in awarding ksh. 135,729 being compensation for unfair termination of employment.
 - h. the learned magistrate erred in law and in fact in otherwise failing to put into consideration the Appellant’s submissions placed before the Court.
 - i. the learned magistrate erred in law and in fact in awarding costs to the claimant.
17. The Appellant seeks the following reliefs on appeal:-
- a. that the judgment and decree of Hon. D.O Mbeja delivered on 30/9/2022 be varied, substituted and/or set aside, and this Court do dismiss the claimant’s claim in the lower Court.
 - b. that the Appellant’s appeal be allowed with costs.
 - c. such and any other orders as the Court will deem fit.
18. This is a first appeal, and the evidence presented in the trial Court is before me for re-evaluation. A first appellate Court is mandated to re-evaluate both the evidence presented before the trial Court and the trial Court’s judgment, and to arrive at its own independent judgment on whether or not to allow the appeal. This Court is thus empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and to make conclusions on it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand. This duty of a first appellate Court was stated in the case of MURSAL & ANOTHER -VS- MUNESE (SUING AS THE LEGAL ADMINSTRATOR OF DALPHINE KANINI MANESA) CIVIL APPEAL NO. 320 OF 2021 [2021] eKLR. It was stated as follows in the said case:-
- “A first appellate Court has jurisdiction fo reverse or affirm the findings of the trial Court. A first appeal is a valuable right of the parties and unless restricted by the law, the whole case is therein open for rehearing, both on questions of fact and law....
- A first appellate Court is the final Court of fact ordinarily, and therefore a litigant is entitled to a full, fair and independent consideration of the evidence at the appellate stage. Anything less in unjust.”
19. I fully associate myself with the foregoing sentiments; and have nothing useful to add on the duty of a first appellate Court.
20. I will handle the 10 listed grounds of appeal together, and in my view, issues that emerge for determination are as follows:-
- a. whether the Respondent’s employment was terminated by the Appellant, and if so, whether the termination was unfair.
 - b. whether the respodnent is entitled to the reliefs sought in the primary suit.
21. On the first issue, it was a common ground that the respodnent was employed by the Appellant as a day guard. The respodnent pleaded that he was employed on 30/7/2004, while the Appellant maintained that he was employed in 2010. The respodnent pleaded and testified that he was never given a contract of employment. None was produced in evidence by either of the parties. Section 10 (7) of the [Employment Act](#) provides as follows:-
- “(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in Subsection (1), the burden of proving or



disproving an alleged term of employment stipulated in the contract shall be on the employer.”

22. It is to be noted that one of the particulars of a contract of employment prescribed in Section 10(1) of the *Employment Act* is the date of commencement of the employment. The Appellant did not prove that the Respondent was employed in 2010, and did not disprove the Respondent’s assertion that he was employed on 30/7/2004. The Appellant having failed to discharge the burden of proof placed on him by the statute, which echoes on Section 9(2) of the *Employment Act* which obligates an employer to cause a contract of employment to be drawn up stating the particulars of employment, this Court accepts the Respondent’s evidence that he was employed on 30/7/2004.
23. The respondent pleaded in detail, and testified on how the Appellant’s General Manager/the Appellant terminated his employment, while the Appellant pleaded and testified that the respondent absconded duty. It is to be appreciated that absconding of duty by an employee is an act of gross misconduct under Section 44(4) (a) of the *Employment Act*. An employer of an employee who absconds duty is reasonably expected to initiate the process of summarily dismissing such an employee. Section 41 of the *Employment Act* sets out a mandatory procedure that must be adhered to by such an employer. Section 41(2) of the said Act provides as follows:-
- “(2) Notwithstanding any other provision of this part, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
24. It follows that an employer alleging that an employee absconded duty must, where the employee denies absconding, demonstrate what action he/she took when the absconding occurred. The employer may do so by demonstrating that he issued a notice to the employee to show cause why he could not be dismissed and/or disciplined, or that he made efforts to find out the employee’s whereabouts by either sending emails, making phone calls to the employee or contacting the employee’s family or the contacts furnished by the employee at the time of employment. In the present case, the employer (the Appellant) did not demonstrate having taken any such or related action. The allegation that the Respondent absconded duty cannot, therefore, stand.
25. I find and hold that the Respondent’s employment was terminated by the Appellant, and that the termination was unfair as the Appellant was not shown to have complied with the mandatory procedure set out in Section 41 of the *Employment Act*, and the Respondent was not shown to have been served with a termination notice pursuant to Section 35(1) (c) of the said Act. I uphold the trial Court’s finding in that regard.
26. Before delving into the second issue, it is crucial to first establish the Respondent’s salary at the time of termination. The Respondent pleaded and testified that he was earning kshs. 9,200 per month, and asserted that this was an underpayment. He produced in evidence various Minimum Wage Orders issued by the Ministry of Labour in 1998,2013,2015,2017, and 2018 respectively. According to the Regulation of Wages (General) (Amendment) Order 2018, the Minimum Wage for a day watchman in Nairobi, Mombasa and Kisumu was kshs. 13,572.90, inclusive of housing. This Court agrees with the Respondent that he was being underpaid by the Appellant, and for purposes of computing notice pay and compensation payable to the Respondent for unlawful termination, the lawful minimum wage of kshs. 13,572.90 is taken by this Court as having been the Respondent’s monthly salary as at the time of termination.



27. Having said that, I uphold the award of the equivalent of ten(10) months' salary being compensation for unfair termination of employment, taking into account the number of years that the Respondent worked for the Appellant, and the manner in which his employment was terminated. This means kshs. 13,572.9X10=ksh.135,728, which I award the Respondent. I also uphold the award of kshs.13,572.90 being payment pursuant to Section 35(1) (c) of the Employment Act.
28. On the claim for accrued leave not taken, this Court has already made a finding that the Respondent was employed by the Appellant on 30/7/2004. The Respondent pleaded and testified that he did not take leave during the entire employment period. The Respondent is shown to have worked for the Appellant for 15 years and nine (9) months. He was entitled to a minimum of 21 days paid leave for every completed year of service. Section 74(f) of the Employment Act obligates an employer to keep records of each employee's leave entitlement, days taken and days due. The Appellant did not exhibit such documents in the trial Court. For each of the 15 completed years of service, the Respondent was entitled to 21 days pay. I award him ksh.142,515.45 in that regard, and set aside the award of kshs. 164,430 made by the trial Court.
29. I uphold the award of ksh.8,221.50 for pro-rated leave awarded by the trial Court. This I do pursuant to Section 28(1) (b) of the Employment Act.
30. The award of kshs. 155,713.30 being underpaid salary during the period of employment is upheld. The Respondent demonstrated, by producing in evidence various minimum wage orders variously in force during the period of his employment, that he was being underpaid.
31. The award of kshs.384,766 being unpaid house allowance is set aside, as the minimum wage payable according to minimum wage orders which the Respondent produced in evidence included housing. By awarding underpaid salary and housing allowance, the trial Court fell into error, in view of the wording of the minimum wage orders/guidelines.
32. The award of kshs.300,000 being overtime payment was not proved, and is set aside. Alleged overtime payment is in the nature of special damages, and must always be strictly proved. There was no such proof in the present case. The claim based on alleged work done on public holidays was properly declined by the trial Court, as the same was not proved. I uphold that finding.
33. I cannot conclude this judgment without pointing out that salary underpayment and failure by an employer to pay an employee for leave earned but not taken during the period of employment are in the nature of continuing injury as contemplated in Section 90 of the Employment Act, which provides as follows:-

“Notwithstanding the provisions of Section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.”
34. The appeal succeeds to the extent stated in this judgment. For avoidance of doubt, judgment is hereby entered for the Respondent against the Appellant as follows:-
 - a. Compensation for unfair termination of employment.....ksh. 135,728
 - b. Payment in lieu of noticeksh. 13,572.90



- c. Unpaid leave for 15 years.....ksh. 142,515.45
- d. Pro-rata leave.....ksh. 8,221.50
- e. Salary underpayment.....ksh.155,713.30

Total ksh.455,751.15

- 35. The Respondent is awarded interest on the awarded sum at Court rates, to be calculated from the date of the trial Court’s judgment.
- 36. The Appellant shall issue the Respondent with a certificate of service pursuant to Section 51(1) of the *Employment Act* within 30 days of this judgment.
- 37. Each party will bear its own costs of the appeal, but the Respondent is awarded costs of the proceedings in the Court below

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 29TH FEBRUARY 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

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