



**Wairimu v Njuka Consolidated Company Limited (Appeal E032 of 2023)
[2024] KEELRC 442 (KLR) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 442 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E032 OF 2023
AK NZEI, J
FEBRUARY 29, 2024**

BETWEEN

PETER FATHUO WAIRIMU APPELLANT

AND

NJUCA CONSOLIDATED COMPANY LIMITED RESPONDENT

*(Appeal from the decision of Hon. D.O. Mbeja in Msa CM
ELR Case No. E738/2021 delivered on 30th March 2023)*

JUDGMENT

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1. The Appellant was the claimant in Mombasa Chief Magistrate’s Court Employment Case No. 30 of 2021 whereby he had sued the Respondent herein vide a memorandum of claim dated 10/11/2021. The Appellant had pleaded that he had been employed by the Respondent as a driver in April 2021, earning a monthly salary of kshs. 21,000, and that he worked diligently until 12/7/2021 when his services were summarily terminated by the Respondent.
2. It was the Appellant’s further pleading that his employment was terminated by the Respondent after the Appellant demanded payment of his salary arrears which had accumulated to kshs. 160,803, and that the termination was effected without giving the Appellant a notice to show cause and an opportunity to defend himself. That the termination was effected without adhering to the due process as set out in Section 41,43 and 44 of the *Employment Act*, and was therefore unfair.
3. It was the Appellant’s pleading that the Respondent did not give him concise information on the charges levelled against the Appellant, did not pay the Appellant’s salary arrears of kshs. 160,803 and for leave days not taken, and did not act in accordance with justice and equity in terminating the Appellant’s employment.



4. The Appellant sought the following reliefs in the primary suit:-
 - a. A declaration that termination of the Appellant’s employment was unfair and unlawful.
 - b. 12 months(salary) in compensation for unfair termination of employment kshs. 252,000
 - c. Payment in lieu of notice..... ksh. 21,000
 - d. Salary arrears..... ksh. 160,803
 - e. Annual leave not taken (kshs.21,000X 9 years)..ksh. 189,000
 - f. Service pay (ksh.10,500x9 years).....ksh. 94,000
 - g. Issuance of a certificate of service.
 - h. Costs of the suit and interest at Court rates.

5. Documents filed by the Appellant alongside the memorandum of claim included his written witness statement dated 10/11/2021 (which replicated the averments made in the memorandum of claim) and an evenly dated list of documents, listing 7 documents. The listed documents included a letter by the Respondent dated 12/7/2021, a recommendation letter by the Respondent, the Appellant’s letter to the Respondent dated 21/11/2018, NSSF statement salary bank statement, demand letter dated 12/10/2021 and a copy of the Appellant’s identity card.

6. The Respondent entered appearance and subsequently filed response to the Appellant’s claim, denying the same. The Respondent is not shown to have filed any other document.

7. Trial is shown to have opened on 3/10/2022 when the Appellant testified and adopted his filed witness statement as his testimony. He also produced in evidence the documents referred to in paragraph 5 of this judgment. Cross-examined, the Appellant testified that he did not go on leave as they were not allowed to go on leave, and that his leave days had not been paid.

8. The Respondent is not shown to have presented any evidence at the trial, and both parties are shown to have filed written submissions pursuant to the trial Court’s directions in that regard.

9. Failure by the Respondent to present evidence in prosecution of its defence meant that the evidence presented by the Appellant in prosecution of his claim was uncontroverted and therefore rebutted; and that the Respondent’s statement of defence/response remained a mere unsubstantiated statement of fact. It was stated as follows in *Edward Muriga (through) Stanley Muriga -vs- Nathaniel D. Schulter – Civil Appeal No. 23 OF 1997* cited in *Billiah Matiangi -vs- Kisi Bottlers Limited & Another* [2021] eKLR):-

“In this matter, apart from filing its statement of defence, the defendant did not adduce any evidence in support of its assertions made therein. The evidence of the 1st plaintiff and that of the witness remain uncontroverted, and the statement in the defence therefore remains mere allegations.....Sections 107 and 108 of the *Evidence Act* are clear that he who asserts or pleads must support the same by way of evidence.”

10. It was stated as follows in *Trust Bank Limited -vs- Paramount Universal Bank Limited & 2 others – Nairobi (milimani) HCCC NO. 1243 of 2021:-*

“It is trite where a party fails to call evidence in support of his case, that party’s pleadings remain mere statements of fact.



In so doing, the party fails to substantiate its pleadings. In the same vein, the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is unconverted and therefore unchallenged.”

11. It is to be noted that failure by a defendant to adduce evidence does not in any way lessen the standard of proof and/or the burden of proof on the part of the plaintiff/claimant. It was stated as follows in *Kenya Power And Lighting Company Limited -vs- Nathan Karanja Gachoka & Another* [2016] eKLR:-

“.....Uncontroverted evidence must bring out the fault and negligence of the defendant, and a Court should not take it as truthful without interrogation for the reason that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability, whether the evidence is unchallenged or not. (See *Kirugi & Another -vs- Kibaya & others* [1983] eKLR)”
12. In the present case, the trial Court delivered its judgment on 30/3/2023, vide which it made a finding of unfair termination of employment and awarded the Appellant Ksh. 147,000, made up of the equivalent of six months’ salary and payment in lieu of notice. Further, the trial Court disallowed the Appellant’s claim for salary arrears, unpaid annual leave days and service pay.
13. Aggrieved by the said judgment, the Appellant preferred the present appeal and set out the following grounds of appeal:-
 - a. the learned magistrate misdirected himself and based his finding on wrong considerations.
 - b. the learned magistrate failed to consider the fact that the Appellant had salary arrears never paid by the Respondent.
 - c. the learned magistrate erred in fact by failing to consider and to take into account the evidence adduced on behalf of the Appellant.
 - d. the learned magistrate failed to appreciate the submissions of the learned counsel for the Appellant by finding in favour of the Respondent herein.
 - e. in all circumstances of the case, the findings of the learned magistrate are unsupportable in law or on the basis of the evidence adduced.
 - f. the learned magistrate erred in fact by failing to take into account and to consider the evidence adduced on behalf of the Appellant.
14. The Appellant seeks the following reliefs on appeal:-
 - a. that the appeal be allowed.
 - b. that judgment delivered in favour of the Appellant be varied and/or set aside.
 - c. that costs of the appeal be awarded to the Appellant.
15. This is a first appeal, and the evidence presented before the trial Court is before me for re-evaluation and/or fresh consideration based on the grounds of appeal set out in the memorandum of appeal filed herein. It was stated as follows in *Mursal & Another -vs- Manese*[2022] eKLR:-

“ A first appellate Court is mandated to re-evaluate the evidence before the trial Court as well as the judgment and to arrive at its own independent judgment on whether or not to allow the appeal. A first appellate Court is empowered to subject the whole of the evidence to



fresh and exhaustive scrutiny and to make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand.”

16. I will handle the grounds of appeal together, and in my view, the following issues emerge for determination:-
 - a. whether termination of the Appellant’s employment was unfair.
 - b. whether the Appellant is entitled to the reliefs that were sought in the trial Court.
17. On the first issue, the Appellant’s pleading and evidence that his employment was terminated by the Respondent abruptly, without notice and without the Appellant being given an opportunity to be heard, was never controverted by the Respondent. The trial Court made reference to Sections 41 and 45(2) of the *Employment Act*, and further noted that the Appellant was not given adequate termination notice, and made a finding that termination of the Appellant’s employment was unfair. I uphold that finding. I am satisfied that the Appellant demonstrated, on a balance of probability, that the termination of his employment was unfair.
18. On the second issue, I uphold the award of the equivalent of six months’ salary made by the trial Court in compensation to the Appellant for unfair termination of employment. It was never disputed that the Appellant was earning a monthly salary of kshs. 21,00 at the time of termination. The equivalent of six months’ salary is ksh.21,000X6 = kshs. 126,000. I also uphold the award of one(1) month salary in lieu of notice, which is kshs. 21,000.
19. On the claim for kshs. 160,803 being salary arrears, the Appellant testified and produced in evidence a letter dated 12/7/2021, written by the Respondent on its letter head, whereby the Appellant’s total wage (salary) arrears was stated as ksh. 175,803. The Appellant also produced in evidence a written acknowledgement of payment, also printed on the Respondent’s letter headed paper, whereby the Appellant on 12/7/2021 acknowledged payment of kshs. 15,000 in part payment of his wage arrears. This part-payment brought the aforesaid wage arrears down to ksh. 160,803, which is the amount of salary arrears the Appellant was claiming in the trial Court, and still claims. The Respondent never controverted or rebutted this evidence. The Appellant’s claim for kshs. 160,803 being the balance of outstanding salary arrears was proved on a balance of probability, and the same is hereby allowed.
20. The claim for kshs. 94,000 being service pay was disallowed by the trial Court, the Appellant having demonstrated by evidence that he was a member of, and a contributor to NSSF. Section 35(6) (d) of the *Employment Act* disqualified the Appellant from making such claim.
21. On the claim for kshs. 189,000 being payment for accrued leave not taken, the Appellant’s pleading that he worked for the Respondent for 9 years from April 2012 to 12/7/2021, and that he was not paid for annual leave not taken during the period of employment, was not controverted as the Respondent did not adduce any evidence in rebuttal thereof.
22. Section 74(f) of the *Employment Act* obligates an employer to keep records of each employee’s leave entitlement, days taken and days due as specified in Section 28 of the Act. No such records were produced by the Respondent, being the employer. The Appellant was, pursuant to Section 28(1) (a) of the *Employment Act*, entitled to a minimum of 21 working days’ leave with full pay for each completed year of service. There being no evidence by the Respondent that the Appellant either took the leave days or was paid in lieu thereof, the Appellant is entitled to 21 days’ pay for each completed year of service, being payment for accrued leave not taken. I award the Appellant kshs. 132,300 in that regard.
23. I uphold the trial Court’s order that the Appellant be issued with a certificate of service, and the award of costs of the primary suit to the Appellant.



24. The appeal herein succeeds to the extent set out in this judgment. In sum, and for avoidance of doubt, and having considered written submissions filed on behalf of both parties herein, judgment is hereby entered for the Appellant against the Respondent as follows:-
- a. Equivalent of six months' salary being compensation for unfair termination of employmentksh. 126,000
 - b. Payment in lieu of notice..... ksh. 21,000
 - c. Salary arrears..... ksh. 160,803
 - d. Annual leave not taken..... ..ksh. 132,300
- Total ksh. 440,103
25. The awarded sum shall be subject to statutory deductions pursuant to section 49(2) of the Employment Act.
26. The Appellant is awarded interest on the awarded sum at Court rates, to be calculated from the date of this judgment.
27. The Respondent shall issue the Appellant with a certificate of service pursuant to Section 51(1) of the Employment Act, if the same has not yet been issued, within 30 days of this judgment.
28. The Appellant is awarded costs of the appeal and costs of 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

