



**Bash Hauliers Limited v Wachira (Appeal E073 of 2023)  
[2024] KEELRC 371 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 371 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E073 OF 2023  
M MBARŪ, J  
FEBRUARY 22, 2024**

- A. COMPENSATION AWARDED AT KSHS. 84,000;**
- B. NOTICE PAY KSHS. 28,000;**
- C. LEAVE PAY KSHS. 22,615;**
- D. CERTIFICATE OF SERVICE;**
- E. FOR THIS APPEAL AND PROCEEDINGS IN THE  
LOWER COURT, EACH PARTY TO BEAR OWN COST.**

**BETWEEN**

**BASH HAULIERS LIMITED ..... APPELLANT**

**AND**

**SAMUEL WAWERU WACHIRA ..... RESPONDENT**

*(Being an appeal from the judgment by Hon. D.O. Mbeja in  
Mombasa CMELRC No.303 of 2018 delivered on 30 June 2023)*

**JUDGMENT**

1. The background to this appeal is a claim filed by the respondent herein in Mombasa CM ELRC No.303 of 2018 on the grounds that he was employed by the appellant from April 2015 to December 2016 as a driver at a wage of Kshs. 28,000 per month. In December 2016 he reported to work but the appellant issued him with a notice terminating his employment. There was no notice issued or hearing or payment of terminal dues. He claimed the following dues;
  - a. Compensation Kshs. 336,000;
  - b. Notice pay Kshs. 28,000;
  - c. Unpaid leave Kshs. 22,615;



- d. Public holidays Ksh.8,65;
  - e. Overtime Kshs. 73,702;
  - f. Service pay Kshs. 28,000;
  - g. Certificate of service;
  - h. Costs.
2. In response, the appellant made mere denials and that in November 2016 the respondent deserted duty but on 14 December 2016 he reported back to the office and demanded payment of his wages and that he had been ailing but submitted no evidence. He was served with notice of desertion of duty.
  3. The trial court heard the parties and in a judgment delivered on 30 June 2023 made a finding that there was unfair termination of employment and the respondent was entitled to his claims with costs.
  4. Aggrieved, the appellant filed the appeal on the grounds that the appellant was not the employee of the respondent. The evidence in response was not considered on a balance of probabilities especially that there was no employment relationship between the parties. The judgment should be set aside and the claims dismissed with costs.
  5. Both parties attended on 19 December 2023 and agreed to address the appeal by way of written submissions and to attend court on 7 February 2024 to confirm compliance. On the due date, only the respondent attended and had not been served with any written submissions.
  6. The appellant filed submissions on 16 February 2024 out of time. This denied the respondent a fair chance to respond to any submissions.
  7. This is a first appeal and the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its 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 make conclusions about it, bearing in mind that it did not have the opportunity to see and hear the witnesses first-hand. See *Bwire v Wayo & Sailoki* (Civil Appeal 032 of 2021) [2022] KEHC 7 (KLR) (24 January 2022) (Judgment).
  8. The response to the claim comprised mere denials. The application dated 3 August 2020 seeking to amend the response was never prosecuted. There were no work records attached to the response dated 28 November 2018 as required under Section 10(6) and (7) of the *Employment Act*, 2007 (the Act). There is a witness statement of Maadhi Bakari Bendera dated 4 March 2019 on the basis that he was the human resources manager of the appellant and the respondent was employed as a driver in the company but absconded duty on 23 November 2016. There is also the witness statement of Ismail Mohamed Ali the supervisor who testified that the respondent was employed in the company as a driver and voluntarily absconded duty without communication to him as his supervisor.

Maadhi Bakari testified that;

... He (respondent) was not an employee between 2016 and 2019. We have vehicles that carry container Albarakat agreement and are responsible for hiring and firing employees Albarakat pay statutory deductions. Samuel Waweru is not an employee Albarakat dismissed the claimant. ...

9. The claim related to employment from April 2015 to December 2019. The appellant's assertion that there was no employment related to a period outside the period under reference. The witness



statements on record confirm that the respondent was an employee of the company. Where there was an agreement with a third party between 2016 and 2019, the respondent's last day with the appellant was 14 December 2016 when notice terminating his employment over alleged desertion was issued.

The parties had an employment relationship.

10. The employer has the legal duty to file work records. When filing a response, Rule 13 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* mandates a respondent to file its evidence and all the necessary evidence to be relied upon. Failure to prosecute the application dated 3 August 2020 removed such matters therein from the benefit of the appellant. This application cannot be prosecuted under this appeal.
11. To this extent, the finding by the trial court that the respondent was an employee cannot be faulted.
12. The appellant's case was that the respondent deserted duty on 23 November 2016 and only returned on 14 December 2016 to demand payment of his wages. He claimed to have been ailing but did not submit any evidence.
13. An employee alleged to have deserted duty does not terminate his employment. The mere assertion that there is desertion is not sufficient. The employer must demonstrate the reasonable measures taken to bring the subject employee to account and where such efforts fail, the employer is required under Section 18(5) of the act to notify the Labour Officer about the desertion of the employee.
14. Hence the alleged return of the respondent on 14 December 2016 to demand payment of his wages should have been precipitated by the employer issuing him notice to attend work as desertion amounts to absconding duty that is punishable by summary dismissal according to Section 44(4)(a) of the *Act*. However, even where there is an absence from duty, notice must be issued to the employee to explain his conduct, and where the employee fails to respond, the employer is required to demonstrate to the court the measures taken in this regard. See *Richard Kiplimo Koech v Yuko Supermarket Limited* [2015] eKLR;  
  
... it is incumbent upon an employer who alleges that an employee has absconded to make reasonable attempts or efforts to reach the employee and seek any explanation to excuse itself from the application of Section 41 of the *Employment Act, 2007*. A prudent employer such as the Respondent will invariably keep the contact details of its employees.
15. The evidence by the respondent that he was sent away in December 2016 then stands correct. That there was no notice issued or hearing stands correct. To this extent, the findings by the trial court cannot be faulted.
16. An employer who terminates employment without due process or for any substantive reasons results in unfair termination of employment. The subject employee is entitled to notice pay and compensation. However, each award must be justified and with reasons.
17. The award of a maximum compensation of 12 months should only be issued with given reasons. This being the highest award, the trial court ought to have justified the award. Although the allocation of compensation is discretionary, the application of maximum should be judicial and not applied as a matter of course.
18. In this case, the appellant had served from April 2015 to December 2016. He does not give his special circumstances and what measures he has taken to mitigate his case. An award of three months is hereby allocated as an appropriate remedy in the case of unfair termination of his employment.



19. The respondent was earning Kshs. 28,000 per month x 3 all Kshs. 84,000.  
Notice pay was well assessed at Kshs. 28,000.
20. Other claims ought to have been assessed accordingly and not allocated generally.
21. A claim for unpaid leave was not countered by the appellant with any work record demonstrating that the respondent took his annual leave in terms of Section 28 of the Act. The claim for Kshs. 22,615 is justified.
22. On the claim for pay for public holidays, these are not general and each public holiday is gazetted by the Minister. Without particulars, such a claim is not justified.
23. Overtime was claimed without a foundation as to how many hours in a given day. This award was not justified.
24. Service pay is only due when the employer fails to pay statutory dues. The respondent did not give a justification thereof.  
A certificate of service is due at the end of employment.
25. Costs in employment claims are discretionary in terms of Section 12(4) of the *Employment and Labour Relations Court Act*, 2011. Where costs are awarded, reasons thereof should be given. In this regard, parties are to bear their costs.
26. Accordingly, the judgment in Mombasa CM ELRC No.303 of 2018 is hereby reviewed in the following terms;
  - a. Compensation awarded at Kshs. 84,000;
  - b. Notice pay Kshs. 28,000;
  - c. Leave pay Kshs. 22,615;
  - d. Certificate of service;
  - e. For this appeal and proceedings in the lower court, each party to bear own cost.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 22 DAY OF FEBRUARY 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet Muthaine

..... and .....

