



**Mutuku v Victonell Academy (Employment and Labour Relations Appeal E003 of 2022) [2024] KEELRC 369 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 369 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E003 OF 2022**

**HS WASILWA, J**

**FEBRUARY 22, 2024**

**BETWEEN**

**CYNTHIA MAY MUTUKU ..... APPELLANT**

**AND**

**VICTONELL ACADEMY ..... RESPONDENT**

**JUDGMENT**

1. The Appeal herein emanates from the judgement and decree delivered by the Honorable E.K.Usui on the 11<sup>th</sup> February, 2022, in CMELRC Cause number 248 of 2019 delivered. The Appellant being aggrieved with the judgement of the Court filed a memorandum of Appeal on the following grounds; -
  1. That the learned Magistrate erred in law and in fact in awarding the Appellant an inordinately low award being damages for unlawful termination of employment yet the appellant wa a long serving member of the staff at the Respondent’s institution.
  2. That the learned magistrate erred in law and in fact in declining to make an award of notice pay, house allowance, normal overtime dues in favour of the appellant despite overwhelming evidence in support of the Appellant’s case.
  3. That the learned magistrate erred in law and in fact in finding the appellant had not proved her claim of notice pay, house allowance, normal overtime dues to the required standards contrary to the evidence on record.
  4. That the learned magistrate erred in law and in fact in failing to consider the Appellant’s submissions.
2. The Appellant prayed for the following reliefs; -
  1. That the Judgement/ decree of the Honourable Court dated 11<sup>th</sup> February, 2022 be reviewed and or set aside.



2. That costs of this Appeal be borne by the Respondent.

### **Backgrounds of the Facts.**

3. The summary of the case herein is that the Appellant was employed by the Respondent in January 2005 as an ECDE teacher, earning a salary of Kshs 3500 from January, 2005 to February, 2009. In March, 2009 to January, 2011, her salary was increased to Kshs. 7,977 and from February, 2011 to May, 2018, her salary was increased to Kshs 11,050 and at the time of termination she was paid Kshs 12,750. She added that all this time, she was not paid any house allowance.
4. It is the Appellant's case that she used to report to work at 7.00 and work till 6.00 pm working overtime, which was never paid for the 14 years worked.
5. She stated that she was verbally terminated by the manager of the Respondent, John Waweru Wanyoike without any notice, reason or hearing on the 31<sup>st</sup> May, 2018. She took issue with the fact that she was terminated and other new employees who came later than her were retained in employment.
6. She stated that she worked for the Respondent for 14 years and upon termination, she was not paid any terminal dues. She then prayed to be paid Notice pay, House allowance, overtime pay, compensation for the unfair termination and costs of the suit.
7. The Respondent on the other hand admitted to employing the Appellant as an ECDE teacher but stated that the employment was with effect from 27<sup>th</sup> February, 2007 and that the salaries paid was agreed by the parties as such the claim for house allowance should be treated as an afterthought.
8. The Respondent also stated on without prejudice basis that the house allowance was paid and indicated as 'other cash pay' in her payslips.
9. On the overtime claim, The Respondent stated that the appellant herein reported to work at 8 am and left at 5 pm, with a one-hour lunch break given to the teacher, as such, she never worked for any overtime.
10. On the circumstances leading to termination, the Respondent stated that the Appellant had been requested to furnish the school with her TSC number and other academic qualification but that she refused and or failed to furnish the office and upon further demands by the office to be furnished with the said documents, the Appellant deserted duty without notice contrary to the provisions of section 44(4) of the *Employment Act*.
11. After hearing the rival arguments by the parties, the trial Court found out that the Appellant herein was required to have a TSC number which she did not. That the Respondent issued the Appellant with notice dated 2.5.2018 demanding for the notice, failure to which her services would terminate on 31<sup>st</sup> May, 2018, which notice was sufficient.
12. On reason for termination the Court found that the lack of TSC number was sufficient reason to terminate the services of the claimant because it was illegal to employ unregistered teachers. The Court however took issue with the Respondent for failing to subject the Appellant to disciplinary hearing, holding that due to lack of disciplinary hearing, the termination was procedurally unfair.
13. On the prayer for notice pay, the Court found out that the appellant was given 28 days' notice instead of 30 days and awarded 2 days' notice pay to make notice 30 days. The prayer for overtime was declined because the registered showed the claimant arrived to school between 7:20 and 7:45 and left before 5 pm on some days and other times she did not sign the register.



14. The claim for house allowance was also decline because, the appellant's payslips showed that she was paid overtime. While on compensation the Court found that the claimant had contributed to her termination because she did not procure the TSC. On that regard the trial Court awarded her 3 months' compensation for the unfair termination.
15. Direction were taken for the Appeal to be heard by written submissions, which the Appellant filed on 16<sup>th</sup> October, 2023 and the Respondent filed on the 24<sup>th</sup> January, 2024.

### **Appellant's Submissions.**

16. The Appellant submitted on four issues; whether the termination of the appellant's employment was lawful, whether the appellant was entitled to one month's gross wages in lieu of notice, whether the appellant was entitled to house allowance and whether the appellant was entitled to overtime dues.
17. On the first issue, it was submitted that prior to termination of an employee's employment, an employer has to give an employee the safeguards of sections 41, 43 and 45 of the *Employment Act*. Accordingly, that the Appellant led evidence to the fact that he was terminated verbally on 31<sup>st</sup> May, 2018. That though the Respondent alleged to have served three letters dated 27.2.2018, 23.10.2018 and 2.5.2018, these letter were never served on the Appellant. In any event that the Respondent did not produce any evidence to confirm that the said letters were ever served on the Appellant as is required under section 107 of the *Evidence Act*.
18. It was submitted that the Respondent had employed the claimant for over 14 years and only used the flimsy reason of seeking a TSC number to terminate her services, when the lack of the TSC number had never been an issue for the 14 years worked. It was argued that the termination was unfair because it lacked any substantial reason. Further that the Respondent did not subject her to any disciplinary hearing as is required under the law, a confirmation that indeed the termination was unfair.
19. Having argued as such, the Appellant submitted that in light of the way in which she as terminated, she is entitled to maximum compensation and not three months as awarded by the trial Court. To support this, she cited the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR, where Mbaru J held that Section 41 of the *Employment Act* 2007 is couched in mandatory terms and where an employer fails to follow the mandatory provisions and an employee is terminated, such termination is ultimately unfair. The Appellant also relied on the case of *Liz Ayany v Leisure Lodges Limited* [2018] eKLR.
20. The Appellant reiterated that the manner in which her termination was done, warrants the award of maximum compensation and cited the case *Titus Muriuki Ndirangu v Beverly School of Kenya Ltd* [2022] eKLR
21. On whether the appellant was entitled to Notice pay. It was submitted that since the termination of the appellant was unfair as was found by the trial court, it follows that she is entitled to notice pay. Further that the employment contract dated 26<sup>th</sup> February 2007 specifically provides that upon termination of the employment agreement, then the employee was entitled to one month's salary in lieu of notice. She thus prayed for award of notice pay.
22. On the claim for House allowance, the Appellant submitted that section 107 *Evidence Act* provides that a party asserting a fact has a duty to prove that fact in order for his or her claim to succeed in law. Similarly, that the Respondent did not adduce sufficient evidence that it paid the Appellant House allowance as such that the Respondent should be compelled to pay House allowance claim that accrued from the date of employment in January, 2005 till termination in May, 2018 of Kshs 213,925.20.



23. On overtime claim it was submitted that the appellant used to work overtime and was not paid for the same. He argued that the register provided by the Respondent in support of allegations that the Appellant did not work overtime was disputed in that the register produced covered only the months of January to May, 2015. Therefore, that the remaining years of working overtime was not controverted and hence the Court should award the overtime sought.
24. On costs, it was submitted that that costs follow the event. In support of this proposition, she relied on the case of *Cecilia Karuru v Barclays Bank of Kenya & Anor* Nyeri HCC No. 17 of 2014 and argued that a look at the totality of evidence presented before the trial court, shows that the Appeal is merited. Therefore, costs should be awarded to the appellant.

### **Respondent's Submissions.**

25. The Respondent submitted also on four issues; whether termination of the Appellant's employment was lawful, whether the Appellant was entitled to one month's gross wages in lieu of notice, whether the Appellant was entitled to housing allowance and whether the Appellant was entitled to overtime dues.
26. On the first issue, it was submitted with regard to reason for termination, that the Appellant was required to provide her TSC Certificate by 31st May, 2018 failure to which her services would be terminated on the said date. It was argued that the Appellant informed the Respondent that she did not have a TSC Certificate/ number, when it was one of the requirements for employment because the ministry of Education had illegalized the employment of unregistered teachers. In support of this, they relied on the case of *Moses Kaunda Moro v CMC Motors Group Ltd* [2013] eKLR , where the Court held thus:

“...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”

27. They also relied also on the case of *Maina Munyua v AMREF Health Africa (Previously Africa Medical and Research Foundation Kenya)* [2019] eKLR, in which the Honorable Court held that:-

“...From the foregoing it is clear that the claimant had been given ample notification and was aware that his contract would be terminated should he failed to achieve the qualifications to enable him hold the job. The respondent therefore had valid reason to terminate the employment of the claimant as he failed to achieve the qualification...”

28. Similarly, that in this case, the appellant was required to supply his TSC number/certificate, failure to which she would loss her employment, as such the substantive justification for termination was satisfied.
29. On whether the Appellant is entitled to the relief sought, it was submitted with regard to notice pay that, the Appellant testified that she was terminated verbally without notice nor a hearing by the manager on 31st May, 2018. She also stated in her pleadings that she was discriminated. The Respondent's witness refuted such allegations and stated that in 2015, parliament passed the *TSC Code of Regulation* 2015, in which section 39 (c) & (e) criminalized the employment of unregistered teachers, causing the Respondent to request for the Appellant's TSC number so as to comply with the regulations. He argued that the Appellant was given time to procure the said number by the letter dated 27<sup>th</sup> February, 2018 but she failed to do so. They served another letter dated 24<sup>th</sup> May, 2018 which



letter notified her that unless the TSC number was submitted by 31<sup>st</sup> May, 2018, her service shall stand terminated on that day but again she failed and or declined to comply and instead deserted employment as such notice pay cannot be paid.

30. On the claim for House Allowance, the Respondent submitted that the Appellant's employment agreement provided that she was entitled to a monthly salary of Kshs. 7,430 inclusive of all benefits. Further that the Respondent's witness, Mr. John Wanyoike Waweru, testified that the Appellant was paid house allowance and the same was referred to as 'Other cash pay' as attested in the payslips annexed in the memorandum of claims.
31. On overtime pay, it was submitted that the Appellant allege to report to work at 7.00am to 6.00pm but that the register showed that she used to report between 7.20 and 7.45 and never signed out almost all the time. The Respondent submitted further that the Appellant was required to be in class at 8.00am to 4.00pm and by 5.00pm she was free to leave since the classes end at 4.00pm. Thus any time spend at school past 5 pm, the Appellant was doing so at her own volition and not at the behest of the Respondent.
32. In Conclusion, the Respondent submitted that it is clear that the burden of proving unfair termination rests on the employee while that of justifying that the termination was fair rests on the employer as was reiterated in the case of *Josephine M. Ndungu & others v Plan International Inc* [2019] eKLR, the court said the foregoing: -

“Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the four corners of the legal threshold set out by section 45 of the Act.”
33. Accordingly, that the termination of the Appellant was justified as such the Appeal herein ought to be dismissed with costs.
34. I have considered all the evidence and submissions of the parties herein. This being a 1<sup>st</sup> appeal, this court is obligated to analyze all the evidence a fresh before making any findings.
35. From the evidence of the Appellant claimant, she was an employee of the Republic having been employed in 2005 to 2018.
36. Evidence of the employment relationship is seen from the pay slips exhibited and at February, 2018, the claimant was earning a gross pay of Ksh 15,340/= being 13,039 basic pay and 2300/= cash pay.
37. No appointment letter was exhibited but from the Respondent's evidence they employed the claimant in 2007, 26<sup>th</sup> February, as per the agreement exhibited showing the condition of the engagement. The salary payable was 7430/= per month inclusive of all benefits. She was also to be responsible for the payment of her income tax. When cross examined about her evidence in chief, the claimant/Appellant denied being paid any house allowance.
38. The Respondents in their evidence aver that they employed the claimant/appellant in January, 2005 as an Assistant teacher, but didn't issue her with any employment letter until February, 2007.
39. They argued that they were given instruction by the TSC not to employ any unregistered teachers and they notified the appellant to submit her TSC number which she failed. They then decided to terminate her service.



40. The Respondents deny that the Claimant used to do any overtime work and that she didn't claim for underpayment and that she was paid per scale.
41. The trial court considered the evidence above and decided that the claimant was not unfairly terminated as she was aware of the fact that she was supposed to provide her TSC number which she failed to do.
42. Other than this, on the prayers sought, the trial court found that the claimant was granted 28 days instead of 30 days' notice and so was entitled to 2 days' pay.
43. On overtime pay the court found that she didn't prove the same.
44. As for house allowance, the Hon. trial magistrate found that her salary was payable inclusive of allowances and so was not. Entitled to any house allowance. She was however awarded 3 months' salary as compensation given the circumstances of the termination.
45. My consideration of the evidence on record shows that indeed the claimant was an employee of the claimant. She was however dismissed on 2<sup>nd</sup> May, 2018 after being served with a letter dated 2<sup>nd</sup> May, 2018 which asked her to produce her TSC number and which also was a notice of her termination after 30 days.
46. Indeed these 30 days' notice was to end on 2<sup>nd</sup> June, 2018 and on this day she was issued with a certificate of service dated the same day. It is evident that she reported to the Labour office the incident and a conciliator was appointed to concile the parties. The conciliation failed hence this claim.
47. In his judgement, the Learned Magistrate found that the Claimant /Appellant was given notice less 2 days which is not true because the letter of 2<sup>nd</sup> May, 2018 indicated that the Appellant had been issued with a 30 days' notice. The issue of her being terminated without notice is therefore not true. However section 41 of the Act 2007 states as follows:

“ Subject to section 42

1. an employer shall, before terminating the employment of employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice.
2. Notwithstanding any other provision of this part, an 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 grounds or misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

48. Despite the fact that the Respondents position is that they had valid reasons to terminate the Claimant/ Appellant they didn't take her through any disciplinary processes.

Section 45 (2) of the Act 2001 states as follows.

“ A termination of employment by an employer is unfair if the employer fails to prove-

- a. That the reason for the termination is valid
- b. That the reason for the termination is a fair reason-



- i. The related to the employees conduct, capacity or compatibility;  
or
- ii. Based on operational requirements of the employer; and
- c. That the employment was terminated in accordance with the fair procedure.”

49. It is apparent that the Appellant was condemned unheard and I therefore find her termination was unfair. In the circumstance the Appellant is entitled to compensation for unfair termination which I find she was not awarded and I accordingly find for her and award her compensation of 8 months' salary given her long service with the Respondent =  $8 \times 15,340 = 122,720$ .

50. As concern notice pays, I find that she was adequately given the notice of 30 days and so the claim for notice pay is not a merited.

51. As concerns house allowance, the appointment letter of the Appellant was clear that she was being paid a consolidated pay. This is as provided to under section 31 (2) (b) of the Act which provides as follows.

“ This section shall not apply to an employee whose contract of service

- (b) Is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a)”

52. In the circumstances, the claims for house allowance is not merited. On overtime pay the Appellant indicated that she worked overtime and was not compensated for the same. The appointment letter the Appellant indicated that she was entitled to work overtime with no extra pay when there is pressure of work. This definitely was an illegality planted in her contract because it is clear that overtime pay a payable. That notwithstanding the claim for overtime is only payable for claim of 3 years before the filing of this claim and this therefore can only fall from 16<sup>th</sup> July, 2016 to 2<sup>nd</sup> June, 2018 when the Appellant was terminated the rest of the claim being time barred.

53. In the pleadings however, the claim is from 2005 to 2018 which partly falls with the time barred period. From the time sheet filed by the Appellant, it is apparent that she occasionally worked overtime but the tabulation has not been explained or segregated. The Appellant failed to explain in her pleadings the total number of hours of overtime as per the pleadings and I find this trial court rightly found the claim for overtime not proved. I find the appeal succeeds in part and I substitute the lower courts award with compensation of 8 months' salary for unfair termination =  $8 \times 15340 = 122,720$  / = Less stationery deductions plus costs of both the lower court and of this court plus interest at court rates with effect the date of this judgement.

**JUDGEMENT DELIVERED VIRTUALLY THIS 22<sup>ND</sup> DAY OF FEBRUARY, 2024**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

In the presence of:-

Nyaga holding brief for Mwangi for Respondent

No appearance for Appellant

Fred court assistant

