



**Mwaidza v Babito General Contractor & Suppliers Limited (Appeal
E053 of 2023) [2024] KEELRC 395 (KLR) (22 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 395 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E053 OF 2023
M MBARÚ, J
FEBRUARY 22, 2024**

BETWEEN

MKOMBE MUNGA MWIDZA APPELLANT

AND

BABITO GENERAL CONTRACTOR & SUPPLIERS LIMITED .. RESPONDENT

*(Being an appeal from the judgment of Hon. M. Nabibya delivered
on 18 May 2023, in Mombasa CM ELRC No. E118 of 2020)*

JUDGMENT

1. The appellant filed this appeal following judgment in Mombasa CM ELRC E118 of 2020 on 18 May 2023. The appeal is that the appellant was employed by the respondent as a loader on 1st July 2017 to 10 October 2020. His duties were to accompany the driver to load and unload luggage into motor vehicles and change tyres and worked for 7 days each week at a wage of Kshs. 8,000 per month. He claimed that his working conditions were not conducive since he was not allowed to take rest day, annual leave, housing or allowance.
2. The appellant's case was that on 10 October 2020 he reported to work and his supervisor Mr Boba Mohamed told him that his terms of service had been changed to a night watchman. He tried to negotiate but the supervisor threw him out of the premises and told him his employment was terminated. There were no reasons given for the change of employment or for the termination of employment. He was not paid his terminal dues and he claimed the following:
 - a) Salary for 10 days worked in October 2020 Kshs. 7,046;
 - b) Notice pay Kshs. 16,857.68;
 - c) Unpaid house allowances for 38 months Kshs. 83,555.54;
 - d) 3 years leave pay Kshs. 44,389.80;



- e) Unpaid public holidays Kshs. 201,155.22;
 - f) Underpayments Kshs. 324,563.24;
 - g) Service pay for 3 years Kshs. 25,286.52;
 - h) 12 months' compensation Kshs. 202,292;
 - i) Certificate of service; and
 - j) Costs.
3. In response to the claim, the respondent's case was that the appellant was at one point an employee of the respondent having been employed as a loader on 1st July 2017 up to 11 October 2020 when he absconded duty without any explanation. Relevant communication issued without success. At the time, the appellant was earning Kshs. 16,857.68 per month inclusive of allowances. The appellant had no disciplinary issue to justify absconding duty. He was paid all his dues and registered with NSSF and NHIF, he took his weekly rests, annual leave and house allowances was paid as part of his consolidated wages.
 4. In judgment, the learned magistrate dismissed the appellant's claim on the basis that he absconded duty.
 5. Aggrieved, the appellant filed this claim on seven grounds that there was error in the finding that he had deserted duty whereas his employment had been unfairly terminated by the respondent. The claims made were not assessed despite the evidence presented before the trial court and for these reasons, the judgment should be reviewed and the claims assessed accordingly.
 6. Both parties attended and agreed to address the appeal by way of written submissions.
 7. The appellant submitted that the trial court erred in making a finding that he deserted duty, which was not the case. He was sent away by his supervisor leading to unfair termination of employment. The court has since clarified the difference between desertion and absconding duty in the case of *Chrispine Onguso Okinyi v Devki Steel Mills Limited* [2018] eKLR. evidence of desertion must be presented through work records. Absconding duty is where the employee fails to return to work after permission is granted. In the case of *Paul Mwakio v Reliable Freight Services Limited* [2022] eKLR the court held that without the employer submitting any attendance register, a case of desertion or absconding duty is lost.
 8. The appellant submitted that upon the trial court making its findings, whether there was unfair termination of employment or not, the court ought to have assessed his claims on the merits. He had various claims for 10 days worked, unpaid house allowances, accrued leave days, unpaid public holidays and rest day, service pay all tabulated in his Memorandum of Claim. He was also not awarded a Certificate of Service in terms of Section 51 of the *Employment Act*, 2007 (the Act). service pay is also due under Section 35(5) of the Act. Underpayments are regulated under the Wage Orders and should have been assessed. Without work records, the trial court erred in failing to go into the claims and make an assessment as held in *Meshack Kii Ikulume v Prime Fuels Kenya Limited* [2013] eKLR. On this basis, the appeal should be allowed and the claims made awarded with costs.

The respondent did not file any written submissions.
 9. This being a first appeal, the court is mandated to re-evaluate the evidence and pleadings and arrive at own conclusions. However, account must be taken that the trial court had the chance to hear the witnesses in evidence.



10. The respondent as the employer does not deny employment. The admission is to the extent that the appellant worked peacefully and uninterrupted for the respondent from 1st July 2017 to 11th October 2020. That he then deserted duty to date.
11. The appellant's case before the trial court was that his employment was terminated on 10th October 2020 he was informed that his duties had changed from a loader to a night watchman and when he tried to negotiate, his supervisor terminated his employment.
12. In his evidence before the trial court, the appellant testified that his employment was terminated unfairly on 10 October 2020 and did not abscond duty as alleged. He was paid for 10 days worked and he would be paid Kshs. 10,000 after every 3 months but no contract or other work records were issued to him. his work attendance registers were kept by the respondent.
13. Indeed, as the appellant has submitted, where an employer alleges that the employee has deserted duty, the burden of proof rests on the employer to prove such matter. Desertion of duty is a grave matter and once proved, such is defined as gross misconduct under Section 44(4)(a) of the Act. An employee who is absent from work without good cause of permission of the employer commits gross misconduct. In the case of *Ronald Nyambu Daudi v Tornado Carriers Limited* [2019] eKLR the court held that it is however not enough for an employer to simply state that an employee has deserted duty. The employer alleging desertion against an employee must show efforts made towards reaching out to the employee and putting them on notice that termination of employment on this ground is under consideration. See also *Evans Ochieng Oluoch v Njimia Pharmaceuticals Limited* [2016] eKLR.
14. However, the employee does not terminate his own employment in such circumstances. The employer must take a proactive action to issue notice to the subject employee and where the employee fails to attend, issue notice of summary dismissal. To cover the employer, notice must also issue to the Labour Officer pursuant to the provisions of Section 18(5)(b) which requires that;
 - (5) Upon the termination of a contract of service—
 - (a) ...;
 - (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled; and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.
15. Without proof of such matter and procedures, the word of the employee must be believed. That employment terminated at the instance of the employer without notice, reasons and devoid of the due process. The findings by the trial court that the appellant deserted duty in the absence of any records by the respondent to prove what action was taken to have him address such misconduct is not justified. The court finds, there was lapse in due process and the appellant's employment was unfairly terminated contrary to Section 35 of the Act for lack of Notice, section 41 of the Act for lack of a hearing, Section 43 for lack of fair reasons and he is entitled to notice pay and compensation in terms of Section 45 and 49 of the Act.
16. On the claims made for pay for days worked, house allowances, leave days, rest days, public holidays, service pay, underpayments and issuance of Certificate of Service, these claims ought to have been analysed and a finding made. This is a requirement under Section 18(5)(a) of the Act, the reason leading to termination of employment notwithstanding. These provisions require that;



- (5) Upon the termination of a contract of service—
- (a) by effluxion of time, it shall be the duty of the employer to ensure that the employee is paid the entire amount of the wages earned by or payable to the employee and of the allowances due to him as have not been paid;
17. On the claim for 10 days worked in October 2020, the appellant testified that he was paid for 10 days worked.
18. Notice pay is claimed at Kshs. 16,857.68. The appellant's case was that he was earning Kshs. 8,000 per month and on this basis has also claimed underpayments. To support his case, he filed his Mpesa statements. In December 2017 he was paid Kshs. 8,000 by the respondent. In November 2017 he was paid Kshs. 6,410. The letter of Employment Offer filed by the respondent confirms that the wage paid was Kshs. 8,000 per month for the position of Turn boy.
19. A loader working in Mombasa in July 2017 had a basic wage of Kshs. 13,960.80 plus 15% house allowance, total due in gross wage is $Kshs. 2,094.12 + 13,960.80 = 16,054.92$ per month.
20. in October 2020, the basic wage was Kshs. 16,417.90 and 15% house allowance Kshs. 2,462.69 + 16,417.90 = Kshs. 18,880.57. this is due in notice pay in accordance with Section 35 and 49(2) of the Act.
21. On the claim for unpaid house allowances for 38 months, the letter of Employment offers made provision for a consolidated wage of Kshs. 8,000. An employer cannot offer less terms to an employee which are below the minimum wage. such offer, even though accepted by the employee is invalid to the extent that the due wage should not go below the legal minimum. The house allowance is payable on the wage due. From July 2017 to April 2018, the house allowance payable is $Kshs. 2,094.12 \times 10$ months, total due is Kshs. 20,941.20.
22. From May 2018 to April 2020 the wage due was Kshs. 14,658.85 and the house allowance due was Kshs. 2,198.82. for 24 months total due is Kshs. 52,771.86.
23. From May to October 2020 the house allowance due was Kshs. 2,462.69 and for the 5 months, the allowance due is Kshs. 27,313.45. total house allowance due is Kshs. 101,025.45.
24. Taking of annual leave is a right secured under Section 28 of the Act. the respondent filed record for rest days and public holidays but there is no record of the annual leave allocation. The appellant testified that he would be paid Kshs. 10,000 after every 3 months. Such well compensates him for these claims.
25. On the claim for underpayments at Kshs. 324,563.24, as outlined above, over the years, the appellant's employment was regulated under the Wage Orders. The particulars under paragraph (6) of the Memorandum of Claim dated 6 November 2020 are proper save, these includes a 15% house allowance claimed separately and above addressed. The sum of Kshs. 324,563 less 15% (Kshs. 48,684.45) all at Kshs. 275,879 in underpayments.
26. The claim for service pay is due where the employer fails to demonstrate registration and remittance of employee dues to the statutory body outlined under Section 35(5) or (6) of the Act. on 15 November 2022, Kombo Abed Abdallah testified for the respondent and confirmed that the respondent would pay NSSF for all employees. this evidence was not challenged in any material way. With such compliance, service pay is not due.
27. On the claim for compensation, without proof of a justified reasons leading to the inaction over alleged absence from duty, the appellant's employment was terminated unfairly and compensation ought



to have been assessed accordingly. The respondent's evidence that the appellant was found to have overloaded his vehicle with charcoal is an aspect of misconduct which the trial court should have put into account as required under Section 45(5) (b) of the Act. all facts considered, an award of one-month compensation is hereby found appropriate at the last due gross wage of Kshs. 18,880.57.

28. A certificate of service should issue to the employee at the end of employment the reason leading to end of employment notwithstanding. A good practice is to allow the employee to clear any liabilities and upon which, the certificate should issue in accordance with Section 51 of the Act.
29. On the claim for costs, the appeal is largely successful and the appellant is awarded costs for his appeal and for the lower court, each party to bear own costs.
30. Accordingly, judgment in Mombasa CM ELRC E118 of 2020 is hereby set aside the following orders issued;
 - a) There was unfair termination of the appellant's employment by the respondent;
 - b) Compensation awarded at Kshs. 18,880.57;
 - c) Notice pay awarded at Kshs. 18,880.57;
 - d) House allowance due is Kshs. 101,025.45.
 - e) Underpayments assessed at Kshs. 275,879;
 - f) Certificate of Service shall issue in accordance with Section 51 of the [Employment Act](#), 2007;
 - g) The appellant is awarded costs of this appeal. Each party to bear own costs for the lower court proceedings.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

