



**Mombasa Cage Inn Limited v Mangale (Appeal E084 of 2023)
[2024] KEELRC 373 (KLR) (15 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 373 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E084 OF 2023
M MBARÚ, J
FEBRUARY 15, 2024**

BETWEEN

MOMBASA CAGE INN LIMITED APPELLANT

AND

EZEKIEL NYAWA MANGALE RESPONDENT

*(Being an appeal from the judgment of Hon. R.M. Amwayi (PM)
delivered on 26 July 2023 in Kaloleni MC ELRC No. E009 of 2022)*

JUDGMENT

1. The background to this appeal is a claim that was filed by the respondent herein in Kaloleni MC ELRC No. E009 of 2022 on the grounds that on 1st May 2010 he was employed by the appellant as a cleaner earning a wage of Kshs. 10,000 per month and later, he was promoted to the position of a manager in the year 2014 earning Kshs. 20,000 per month. his claim was that he was underpaid, he was not allowed to take annual leave and at the end of his employment, he was not paid his terminal dues. he made the following claims;
 - a. 3 months' notice pay Kshs. 60,000;
 - b. Severance pay for 10 years Kshs. 230,000;
 - c. 10 years leave pay Kshs. 224,868;
 - d. Underpayments Kshs. 1,440,000;
 - e. Unremitted NSSF Kshs. 6,000 and NHIF Kshs. 67,500;
 - f. Damages for unfair termination of employment Kshs. 480,000;
 - g. Costs of the suit.



2. In response, the appellant denied the claims and that the respondent failed to account for monies he was to remit at NSSF and then absconded duty. The matter was reported at Changamwe Police Station via OB11 of 31st May 2020 by Sammy Nzioka (deceased). Police offices at Changamwe carried out a manhunt and arrested the respondent and detained him. The arrest was for the offence of stealing by servant and the matter is pending. There was no termination of employment as alleged since the respondent absconded duty and failed to account for NSSF funds misappropriated and the claims made are not justified.
3. In response, the appellant denied jurisdiction of the court on the grounds that the cause of action arose in Mombasa and ought to have been filed in Mombasa Court.
4. The trial court heard the parties and delivered judgment on 26 July 2023 with a finding that there was unfair termination of employment and the claims made were justified.
5. Aggrieved by the findings and awards, the appellant filed this appeal on nine grounds that the hearing proceeded in error when the trial court failed to take into account that the firm of advocates representing the appellant had ceased acting for them and a new firm was yet to come on record. On 24 July 2023 the court certified application dated 20 July 2023 seeking to arrest the judgment to enable the appellant to open the case for hearing but proceeded to deliver the judgment on 26 July 2023 before hearing the subject application placed for hearing on 8 August 2023 and hence the judgment was wrong.
6. Other grounds of appeal are that the trial court erred in ignoring the fact that the appellant had filed a response to the claim and denied jurisdiction of the court as the dispute arose in Mombasa and hence failed to consider territorial jurisdiction as challenged in the response. The appellant is based at Changamwe in Mombasa and the respondent was based at Likoni in Mombasa and hence both parties were best placed to be heard at Mombasa Law Courts and the judgment of the court was wrong in this regard. The trial court ought to have downed its tools for want of territorial jurisdiction. The award of Kshs. 2,164,868 while it had no jurisdiction and in this regard the entire judgment ought to be dismissed with costs and the appeal be allowed.
7. Both parties attended and agreed to address the appeal by way of written submissions.
8. The appellant submitted and reiterated the grounds of appeal and that the refusal by the trial court to arrest the judgment to allow the appellant replace its advocates was an error. The appellant was hence not given a fair hearing in its response. The judgment was delivered before the application could be heard which led to a wrongful judgment.
9. The appellant submitted that the trial court had no territorial jurisdiction and the matter must have been filed at Mombasa and not Kaloleni. Without jurisdiction the trial court ought to have downed its tools and hence its judgement was wrong.
10. The award of the trial court judgment was exorbitant at Kshs. 2,164,868 totally outside jurisdictions and the subject judgment issued in error and supported by no evidence to support it and ought to be struck out. Without any evidence recorded from the appellant, the judgment delivered on 26 July 2023 should be set aside in its entirety and the appeal allowed with costs.
11. The respondent submitted that the allegations that the appellant advocates had ceased from acting for them and were not allowed to arrest the judgment is baseless and a misappropriation of facts. Since filing of the suit and service to attend court, the appellant's sole aim was to frustrate the hearing and finalisation of the matter. On 8 March 2023 when the matter came up for pre-trial hearing, both parties attended and a hearing date allocated by consent on 9 May 2023 and on the due date, the appellant attended virtually and time for hearing was allocated but at the appointed hour failed to



- attend. Another hearing date was allocated for 6 June 2023 and notice issued but the appellant failed to attend. The trial court proceeded with the hearing for good cause. The record is evidence of inaction on the part of the appellant.
12. The respondent submitted that the appellant filed Notice of Change of Advocate on 3 July 2023 and the matter was mentioned on 4 July 2023 to confirm the filing of written submission. The appellant's advocates attended and a date for judgment was allocated by consent for 26 July 2023. Application to arrest the judgment was not filed until 21st July 2023 which was allocated for hearing on 8 August 2023. The respondent was entitled to an expeditious conclusion of his case under Article 159 of *the Constitution* and the mistakes of the appellant should not be visited against him.
 13. With regard to challenged territorial jurisdiction of the trial court, Section 15 of the *Civil Procedure Act*, the cause of action arose at Mazeras area where the appellant's business is located within the jurisdiction of the court. the learned magistrate who heard the matter is a Principal Magistrate with jurisdiction throughout Kenya as held in the case of *Jedidah Katwa Kweyu v John Njoroge Ngige & another* [20115] eKLR.
 14. The award of Kshs. 2,164,868 followed proper consideration of the claim and circumstances of the case and should be confirmed and the appeal dismissed with costs.
 15. This being a first appeal, the court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is allowed to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand as held in the case of *Mursal & another v Manese* (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021) [2022] eKLR. Such mandate is defined to include jurisdiction to reverse or affirm the findings of the trial court. A first appeal is a valuable opportunity of the parties to open for rehearing both on questions of fact and law.
 16. The territorial jurisdiction of the court was challenged by the appellant. This ought to have been addressed instantly. The principle objective being that jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence as held in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989], eKLR. That principle has not changed and is reaffirmed by various court including the Supreme Court of Kenya in the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR.
 17. In this case, in the Memorandum of Claim filed by the respondent on 16 May 2022, at paragraph (2), he defines the appellant as a company whose registered office is at Mombasa. The witness statement at paragraph (1), the respondent identified himself as a person resident at Changamwe, Mombasa County. All documents filed by the respondent to support his case including NSSF and NHIF statements indicate that the appellant is based in Mombasa. The submissions that the company is located at Mazeras is not supported by any documentary evidence.
 18. Whereas this court has original jurisdiction to hear and determine employment dispute pursuant to Article 162(2)(a) of *the Constitution*, the Chief Justice is allowed under Section 29 (3) and (4) (b) of the *Employment and Labour Relations Court Act*, 2011 to designate magistrates of the rank of Senior Resident Magistrate to hear disputes relating to employment. Through Legal Notice No.6024 of 10 June 2018, the Chief Justice designated lower courts of such rank to hear employment claims where an employee earns up to Kshs. 80,000 per month.



19. These provisions should be read together with Section 15 of the *Civil Procedure Act* which requires that a suit be where respondent resides or cause of action arose. The law hence requires that a claimant do file the claim at the closest court where the employer resides and particularly where the cause of action arose as held in *Bud and Blooms Ltd v Jonathan Balongo Okumu* [2021] eKLR. see also the case of *Korea Nyamai v Neema Parcels Limited* [2021] eKLR.
20. It is therefore a territorial jurisdiction issue where a party opts to remove a matter from where the cause of action arose and file it away from where the employer is ordinarily resident. Such negates the provisions of Rule 4 and 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016 which requires a claimant to file a claim and a respondent to reply guided by the Labour Officer covering the area where the employer is situated.
21. In exercise of its jurisdiction, the court should be assisted by various officers including the Labour Officers. The Labour Officer responsible for the area where the employer is situated is a key office and once called upon to attend should be able to attend within the area of mandate. To place a matter before a court outside where the employer is situated therefore defeats the purpose of Legal Notice No.6024 which was meant to assist in access to justice and not be an impediment.
22. The trial court is based at Kaloleni, this is Kilifi County, way outside the nearest court where parties ought to have been heard at Mombasa County and Mombasa Law Court where the court is served by several Magistrates of the rank of Senior Resident Magistrate and above. There is no reason why such territorial matter was not addressed first.
23. However, taking into account that the learned magistrate is of the rank of Principal Magistrate and allowed to hear employment disputes, save for want of proper placement, there was jurisdiction. in the case of *Henry Kigen & 6 others v Baringo County Governor & 2 others* [2020] eKLR the court held that;

“Kenians desired specialised courts to deal with certain matters that they felt should be dealt with by these courts with special expertise and repeated experience in the questions they deal with. What Kenians bargained for, and got in constitutionalizing the two Article 162(2) courts are the benefits associated with the creation of specialized courts in environment and law (as well as employment relations and labour): improved substantive decision making in the two areas fostered by having experts decide complex cases in the two areas and improving judicial efficiency through decreasing the judicial time it takes to process complex cases by having legal and subject-matter experts with repeated experience on the subject-matter adjudicate them. These were the advantages Kenians bargained for in creating Article 162(2) Equal Status Courts. ...

Kenians’ objectives were not to set up judicial booby traps for unsuspecting litigants who after timeously filing and pleading their cases would have to undergo a technical game of jurisdictional Russian Roulette to determine if their case will survive or be struck out. While Kenians did not wish to give litigants a blank cheque to file suits in the wrong fora in bad faith, they intended to give parties a fair chance to have their cases determined on their merits. This intention is defeated if, in close cases filed in a Court of cognate jurisdiction but where the parties subsequently or the Court makes a determination that the particular Court in which the matter has been filed does not have the requisite jurisdiction and that the requisite jurisdiction lies in a cognate court, the Court responds by striking out the suit and requiring the parties to file a fresh the suit. I see no useful purpose that is served by this other than punishing a party that acted in good faith. This would be an appropriate course



of action where it can be shown that the Plaintiff acted in bad faith in suing in the wrong court but not where the Plaintiff acted in good faith.”

24. For access to justice and to secure the overall objectives of the court pursuant to Section 3 of the *Employment and Labour Relations Court Act*, 2011 the learned magistrate had jurisdiction save, the matter would have well been heard at Mombasa Law Courts, the nearest point where the cause of action arose. The appellant did not urge this legal issue instantly.
25. With regard to whether the learned magistrate erred in failing to arrest the judgment delivered on 26 July 2023 to allow the appellant be heard on application dated 24 July 2023, indeed the appellant admits that the matter came up for hearing directions and a hearing date was allocated for 8 August 2023.
26. The record is that, on 21st June 2023 both parties attended court and directions issued to the appellant’s advocates to file application to cease acting within 7 days’ failure to which, the same would stand dismissed.
27. On 4 July 2023, both parties attended court and he appellant had filed a Notice of Change of Advocates. the court allocated 26 July 2023 for delivery of judgment.
28. On 20 July 2023, as noted above, the appellant filed application seeking to arrest the judgment which was addressed by the learned magistrate on 24 July 2023 and directed that the same be heard on 8 August 2023. There seems to be no proactive action taken after the delivery of judgment on 26 July 2023.
29. The appellant was represented before the trial court at all material times. His advocates did not file any application to cease acting. By filing a Notice of Change of Advocates, there was transition from one advocate to the next without any gap. The appellant cannot blame the learned magistrate for inaction to move expeditiously when they learnt that the matter had been placed for judgment having participated in the entire hearing process.
30. The lapse in securing its rights at the opportune moment and partially on 9 May 2023 when the matter was fixed for hearing by consent on 6 June 2023 cannot be blamed on the trial court. also, hearing proceeded after the appellant was served but remained absent for no good cause.
31. With regard to the awards by the trial court, the respondent was awarded as pleaded. As a legal requirement, upon a claim for terminal dues, Section 18(4) of the *Employment Act*, 2007 (the Act) mandates the court to consider each claim on the merits. Each award must be assessed and reasons given for the same.
32. Save for the evidence and pleadings filed in accordance with Rule 4 and 13 of the Court Rules, the court has power under Rule 21, either by agreement by the parties or on its own motion, to proceed to determine the suit before it on the basis of the filed pleadings;
 21. The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions made by the parties.
33. In this regard, Rule 4 and 13 are very crucial when a party is filing its pleadings. All evidence and records must be secured at that point to allow the court, either by agreement of the parties or on *its own motion* to proceed and make a determination.
34. In this regard, this court sitting on appeal is allowed to apply the same Rules and make a determination based on the records.



35. On the claim that there was unfair termination of employment, the respondent's case was that he was employed as a cleaner earning Kshs. 20,000 per month when his employment was unfairly terminated by the appellant. The appellant on the other hand responded that the respondent absconded duty when he took off with NSSF monies he was required to remit. The matter was reported to Changamwe Police Station, he was arrested and charged in court. the appellant gave the details of the OB report.
36. Upon the alleged absconding of duty, save for the police report, there seems to be no internal administrative proceedings taken against the respondent. no notice issued to attend and address any misconduct or gross misconduct of absconding duty or stealing by servant. As a rule, the employee does not summarily determine his employment. Such is the role of the employer in terms of Section 44(4) of the Act as held in *Geoffrey Mworira v Water Resources Management Authority* [2015] eKLR. A criminal report to the police is regulated by a different set of rules and procedures separate from internal disciplinary procedures which an employer must address before termination of employment can be justified as procedurally fair. To leave the employee at large under the mistaken belief that the matter is with the police is an error.
37. In the case of *Paul Mwakio v Reliable Freight Services Ltd* [2022] eKLR the court held that under Section 44(4) (a) of the Act, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The employer must demonstrate what action was taken to summon the employee to respond to any matters of gross misconduct. in the absence of any such record, termination of employment of procedurally unfair.
38. This position is reiterated in the case of *Julius Kyalo Malonza v Ruth Osolo t/a Eraeva Catering Services* [2021] eKLR that;
39. Dismissal on account of absconding must be preceded by evidence showing that reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.
40. Without the appellant demonstrate what measures were taken to endure due process, there was unfair termination of employment.
41. In assessing the compensation to be awarded, the trial court allocated the maximum due pursuant to Section 49 of the Act. The jurisprudence of the court is that; allocation of the allowed maximum compensation must be justified with cogent reasons. One major factor to be put into account is the provisions of Section 45(5)(b) and (e) of the Act. The conduct and culpability of the employee and any work record.
42. It is not contested that the respondent disappeared with NSSF monies, the property of the appellant. The matter was reported to the police and there is a record of the OB details.
43. An employee who conducts himself to the detriment of the employer, causes the employer to incur losses and ultimately engages in matters of a criminal nature, the sanction to issue is summary dismissal in accordance with Section 44(4) of the Act. Save for want of due process that justify notice pay, to allocate compensation to the respondent is to reward gross misconduct. The trial court failed to address itself as regards Section 45(5) of the Act. had this been done, the award made should have been reduced to zero (0) rate.
44. The only ward due is that of notice pay at Kshs. 20,000 in accordance with Section 35 of the Act.
45. On the claim for severance pay, indeed, as correctly analysed by the learned magistrate, this was not a case of redundancy to justify such a claim.



46. On the claim for leave pay for 10 years, in terms of Section 28 of the Act, the appellant ought to have filed work records on how this right was secured. However, in the absence of such record, Section 28(2) of the Act only allow an employee to accumulate annual leave for only 18 months. This amount to 33 days only.
47. On a wage of Kshs. 20,000 per month, for 33 days of annual leave accrued, the respondent is entitled to Kshs. 22,000.
48. On the claim for underpayments, the respondent was employed as a cleaner. There is no contract filed by the appellant. The evidence by the respondent is taken as correct. Without a written contract, the wages due were regulated under the Wage Orders issued by the Minister from time to time.
49. The respondent worked for the appellant from May 2010 to March 2020. He testified that for 5 years he was earning Kshs. 10,000 per month and for the last 5 years of his employment, he was earning Kshs. 20,000 per month. his claim was that there were underpayments.
50. A cleaner and general worker working in Mombasa in the year 2010 had a minimum wage of Kshs. 6,743. The respondent was earning Kshs. 10,000 above such minimum wage and was well compensated.
51. In the year 2015, the minimum wage was Kshs. 10,954.10. there was an underpayment of ksh.954.10 and which accrued for 12 months with an underpayment of Kshs. 11,449.20. this is due.
52. The next phase, the appellant earned Kshs. 20,000 per month. the minimum wage in the year 206 was Kshs. 12,926.55. in the year 2020, the minimum wage was Kshs. 13,572.90.
53. Total due in underpayment is Kshs. 11,449.20.
54. On the claim for unremitted dues to NSSF and NHIF, these are dues owed to the statutory body and not payable to the employee. Where there is no remittance, the employee is entitled in a claim for service pay which is not pleaded in this case. The appellant has filed work records which confirm the respondent was registered and his remittances to NSSF and NHIF were paid.
55. A certificate of service was properly awarded as this is due at the end of employment in accordance with Section 51 of the Act.
56. Ultimately, where an employee fails to account for monies and property of the employer in his custody, such is deducted from his wages or dues in accordance with Section 19(b) and (d) of the Act;
 - b. a reasonable amount for any damage done to, or loss of, any property lawfully in the possession or custody of the employer occasioned by the wilful default of the employee;
 - c. ...
 - d. an amount equal to the amount of any shortage of money arising through the negligence or dishonesty of the employee whose contract of service provides specifically for his being entrusted with the receipt, custody and payment of money;

for the total loss of funds in the custody of the respondent as the employee, these should be deducted from his wages or terminal dues.

on costs, these are discretionary in terms of Section 12(4) of the [Employment and Labour Relations Court Act](#), 2011. Where costs are awarded, reasons should be given.

Accordingly, as analysed above, the appeal partially succeeds and judgment in Kaloleni MC ELRC No. E009 of 2022 is hereby reviewed in the following terms;



- a. termination of employment was procedurally unfair;
- b. compensation assessed at zero (0) rate;
- c. notice pay Kshs. 20,000;
- d. leave pay Kshs. 22,000;
- e. underpayments Kshs. 11,449.20;
- f. dues above shall be paid less the loss incurred by the appellant based on Changamwe Police Station, OB11 of 31st May 2020;
- g. certificate of service shall issue in accordance with Section 51 of the [Employment Act](#), 2007;
- h. each party to bear own costs of this appeal and for the lower court proceedings.

DELIVERED IN OPEN COURT AT MOMBASA THIS 15 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... **and**

