



REPUBLIC OF KENYA



Yaa v Willis (Appeal E011 of 2023) [2024] KEELRC 1489 (KLR) (2 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 1489 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
APPEAL E011 OF 2023
M MBARŪ, J
FEBRUARY 2, 2024

BETWEEN

WINFRIDA MALI YAA APPELLANT

AND

MONICA DIANE MARY WILLIS RESPONDENT

*(Being an appeal from the judgment of Hon. James Ongondo (SPM)
delivered on 16 May 2023 in Malindi CM ELRC No.28 of 2022)*

JUDGMENT

1. The background to this appeal is a claim that was filed by the appellant in Malindi CM ELRC No.28 of 2022 on the grounds that in December 2018 she was employed by the respondent as a house keeper/ general labourer at her house in Watamu. She worked for over 3 months but on 12 September 2022, the respondent issued her with notice indicating that she was moving houses to Plot 789 Watamu and wanted the appellant to clean the new house. The appellant required to be facilitated with travel costs but instead, the respondent orally dismissed her from her employment. The claim by the appellant was that she was being underpaid, there was no pay for 11 days worked in September 2022 and the NSSF remittances were not consistent. She claimed the following dues;
 - a. On month notice pay Kshs. 18,400;
 - b. Underpaid house allowances Kshs. 97,950;
 - c. 11 days in September 2022 Kshs. 6,369;
 - d. Service pay for 3 years Kshs. 19,326;
 - e. Unremitted NSSF and NHIF May to December 2018 Kshs. 2,400; and
 - f. Costs.



2. In response, the respondent denied any employment relationship and that the appellant was brought in by another person for training. The respondent and her husband were uncertain of their own future and hence informed the appellant that they would build their own house. They asked if she should move with them. The respondent then started working on a verbal agreement from December 2018. She did not ask for food or accommodation or any allowances thereof. The respondent asked the appellant if she needed accommodation or transport but she said she lived with her daughter, mother and siblings in Gede. On 5 September [year noted stated], the respondent asked the appellant if she would like to move with them to the new house and she declined. The old house was a 5 minutes' drive away. The respondent wanted to clean the new house on 12 September and moving some boxes but the appellant offered to think about the matter. However, cleaning the new house was urgent and the respondent issued the appellant with letter stating her employment would remain the same. At the end of day, she left and informed the gardener at the gate that she would not return.
3. The respondent also denied the claims made by the appellant on the grounds that her NSSF dues were paid from December 2019 to May 2019 at Kshs. 1,800 which was an overpayment and which covered several months and when she went to confirm at the NSSF offices, she found that the appellant had earlier been there and wanted to be registered as 'self-employed' in October 2019. The claim is filed in bad faith and should be dismissed.
4. The trial court heard the parties and delivered judgment on 16 May 2023 with finding that the appellant deserted duty and failed to proof her case which was dismissed.
5. Aggrieved by the judgment, the appellant filed this appeal on ten grounds that the trial court erred in its findings that she deserted duty and failed to make a finding that there was unfair termination of employment. That the reasons leading to termination of employment and payment of terminal dues are two distinctive issues but the learned magistrate failed to take this into account and award underpayments, house allowance, pay for days worked, service pay, NSSF due, issuance of a Certificate of Service and costs of the suit.
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 finding that there was desertion of duty and failing to declare that there was unfair termination of employment. The respondent chased her away when she refused to sign a letter to move with her to the new house. Such denied the appellant the due process of the law pursuant to Section 35 and 41 of the *Act* which requires notice and hearing before termination of employment as held in the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR. Where the respondent found the appellant to be of misconduct, notice should have issued to allow her the opportunity for hearing as held in *Standard Groups Limited v Jenny Luesby* [2018] eKLR.
8. The appellant submitted that the trial court failed to analyse the remedies sought and only considered one aspect of unfair termination of employment. In dismissing the claim, the terminal dues claimed were not assessed as held in *Nisha Nilesbbhai Bhavsar v Kensalt Limited* [2022] eKLR. Save for compensation, there were underpayments, house allowance, pay for days worked and a claim for service pay for years when statutory dues were not remitted, May to December 2018.
9. The issuance of Certificate of Service was generalised and not addressed while such is a legal requirement.
10. The failure to make a determination of costs whereas this was specifically pleaded was an error. Costs should follow the event and awarded in this case. The appeal should be allowed with costs.
11. The respondent submitted by reiterating the response to the claim.



Determination

12. 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 for the parties to open for rehearing both on questions of fact and law.
13. In response to the appellant's claim, the respondent stated that the appellant was invited to their home for training after which, she was to take up employment. However, within that transaction, she seems to have transitioned to an employee though on verbal terms. This is confirmed by the fact that the respondent started making NSSF and NHIF payments for the appellant. Her daily wage was Ksh.400 per day and at some point, she was required to indicate if she was willing to move to the new house with the respondent. To make the new house ready, the appellant was required to assist in cleaning but she made various demands and asked for time to think about the move and then failed to return to work.
14. Under the law, oral contracts of employment are allowed. Section 7 and 8 of the *Employment Act, 2007* (the Act) permit an employer to commence employment on verbal terms but such informal arrangement should be reduced into writing at the earliest time possible in terms of Section 10 (1) of the *Act*:
 1. A written contract of service specified in section 9 shall state particulars of employment which may, subject to subsection (3), be given in instalments and shall be given not later than two months after the beginning of the employment.
15. Even where the employment relationship commenced causally and over an oral contract, the employer is only protected through a written contract. Where the intention is to employ the employee on piece-rate, casual work or for a fixed term that is renewable after an allocated event or time, the written contract allows the court to appreciate the intentions of the parties.
16. In the absence of any written terms of employment or engagement, the employer is left exposed. The court must believe the employee. The rationale is that the burden of proving or disproving a term of employment is on the employer as held in *Muikamba v Radio Africa Group Limited* (Cause E245 of 2021) [2023] KEELRC 1251 (KLR) (30 May 2023) (Judgment). Where the employer has no written contract, such being a legal requirement, the employer cannot turn back and assert that the statement of the employee is not correct. See also, *Agatha Bugosi Said v Vegpro Kenya Limited* [2014] eKLR.
17. In this regard, the employer has the control of the employee. Instructions must issue from the employer and where the employee fails to oblige, Section 44(4) of the *Act* allow the employer to summarily dismiss the employee as that is gross misconduct. In this case, the respondent submitted that on 12 September she informed the appellant that they would be going to the new house for cleaning. She packed boxes and cleaning equipment but the appellant asked to think about the matter. On her part, the appellant asserts that the respondent as the employer failed to give her transport costs to move to the new place for cleaning. The response that the appellant never resumed her duties after 12 September is not challenged in any material way.



18. However, about the refusal to take lawful directions and instructions from her employer, the respondent did nothing. The appellant was left at large to do as she wished. She did not clean as required and then abandoned her work.
19. An employee who abandons work does not terminate her employment. The proactive response of the employer should be to issue notice and proceed with summary dismissal in terms of Section 44(4)(a) of the Act. To leave the employee to simply walk away only invites a claim of unfair termination of employment as held in the case of *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR that;

...the Appellant had an obligation, if it believed that the Respondent had absconded duty, to lawfully bring the contract of service to closure by invoking the provisions of section 44 of the *Employment Act*. The section permits an employer to terminate an employee who has absconded duty on ground of gross misconduct. ...

Desertion being a unilateral act of abandonment of the contract cannot operate to bring a contract of service to closure until the employer acts on it.
20. The respondent should and ought to have concluded the employment of the appellant by issuing a termination notice. In this regard, the appeal is found with merit. There was employment between the parties and the same terminated unfairly. Notice pay is due and justified.
21. On the claims made, the core principle in employment is that whatever the reasons that result in termination of employment, the dues earned as of that date must be assessed and awarded where due. This is a requirement under Section 18(4) of the *Act*;

(4) Where an employee is summarily dismissed for lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
22. The trial court should have assessed each claim on its merits. A general dismissal upon the finding that the appellant absconded duty is in error.
23. The appellant was earning ksh.400 per month. Notice pay under section 35 of the *Act* would amount of the last due wage of Ksh.411 per day for 30 days all at Kshs. 12,330.
24. On the claim for underpayment of house allowance, the appellant was a general worker in Malindi. Her employment was regulated under the General Wage Orders. For the period of May 2019 to April 2022, the minimum wage was ksh.367 per day inclusive of the house allowance due. The appellant was paid Ksh.400 per day which was way above the minimum wage due and well compensated her for any house allowance due.
25. From May 2022, the Minimum daily wage changed to Ksh.411 per day. The appellant continued to be paid ksh.400 per day which is an underpayment of ksh.11 each day and for 30 days for 4 months, this amounts to $11 \times 30 \times 4 = 1,320$. This is the underpayment of Kshs. 1,320.
26. On the claim for 11 days worked and not paid for in September 2022, there is no record that after the appellant is alleged to have deserted duty her final dues for days worked were paid. For the due wages of ksh.411 per day for 11 days, a sum of Kshs. 4,521.
27. On the claim for service pay, such is only due where the employer fails to pay statutory dues. The evidence that the respondent overpaid to NSSF and NHIF is not challenged in any material way. Such well addresses the provisions of Section 35(5) and (6) of the *Act* and service pay is not due.



- 28. On the claim for unremitted NSSF and NHIF dues for May to December 2018, upon the respondent commencing payments thereafter, such absolves her therefrom.
- 29. On the claim for Certificate of Service, such is a legal entitlement at the end of employment. Such certificate should be issued in accordance with Section 51 of the Act.
- 30. On costs, these are discretionary for the court to award. In this case, the fact of the appellant absconding work is not challenged in any material way. This factored in terms of Section 45(5)(b) of the Act, her culpability and conduct does not justify an award of compensation or costs.
- 31. Accordingly, the appeal is found with merit and the judgment in Malindi CM ELRC No. 28 of 2022 is hereby reviewed in the following terms;
 - a. Notice pay Kshs. 12,330;
 - b. Underpayment Kshs. 1,320;
 - c. 11 days in September 2022 Kshs. 4,521;
 - d. The Certificate of Service shall be issued in accordance with Section 51 of the Employment Act, 2007;
 - e. The dues above shall be paid less statutory deductions.
 - f. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MALINDI THIS 2 DAY OF FEBRUARY 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Nasra

..... and

