



REPUBLIC OF KENYA



KENYA LAW
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Isenze v Luvaso (Appeal E067 of 2022) [2024] KEELRC 1403 (KLR) (14 March 2024) (Judgment)

Neutral citation: [2024] KEELRC 1403 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E067 OF 2022
M MBARŪ, J
MARCH 14, 2024

BETWEEN

BRETTAH K. ISENZE APPELLANT

AND

NIGHT BRIGHT LUVASO RESPONDENT

*(Being an appeal from the judgment of Hon. D. W. Mburu (SPM) in
Mombasa MCELRC No. 1084 of 2019 delivered on 5 August 2022)*

JUDGMENT

1. The background to this appeal is a claim that was filed by the respondent in Mombasa CMELRC No 1084 of 2019 on the grounds that in November 2013 she was employed by the appellant as a house help at a wage of Kshs 8,000 per month. She worked well until January 2018 when her services were terminated without good cause. The appellant found the water dispenser broken and claimed that the respondent was responsible without any evidence. The appellant decided to dismiss the appellant since her wage was not sufficient to pay for the water dispenser. The respondent claimed there was unfair termination of employment and claimed the following dues;
 - a) One-month notice pays Kshs 8,000;
 - b) Leave pay for 4 years Kshs 32,000;
 - c) Gratuity/service pay for years worked Kshs 16,000;
 - d) Underpayments from November 2013 to January 2018;
 - e) Damages for unfair termination of employment Kshs 96,000; and
 - f) Costs.



2. In response, the appellant's case was that most of the time is out of the country. every year since 2013 between 7 December to 18 January the respondent was granted annual leave but most of the time voluntarily declined the same. During this time, the respondent would leave the premises at any time and was not officially on duty. The respondent was always threatening to quit her employment with the appellant and on 31 January 2018 she rudely and abruptly quit and absconded duty thereby terminating her employment. Before quitting the employment, the respondent had on several occasions refused to be accountable, submissive, and respectful to the appellant as her employer and refused to answer several issues culminating in termination of employment. This conduct was demonstrated by the respondent always threatening to quit her employment, being rude and lazy, failing to keep time, carelessness in her work, demanding special meals, constant arguments, and dishonesty. The claims made are not justified and should be dismissed with costs.
3. In the judgment delivered on 5 August 2022, the learned magistrate made a finding that there was an unfair termination of employment and made the following awards;
 - a) Notice pay Kshs 8,000
 - b) Compensation for 8 months Kshs 64,000;
 - c) Service pay Kshs 16,000;
 - d) Underpayments Kshs 123,198.60;
 - e) Costs and interests.
4. Aggrieved by the judgment, the appellant filed this appeal on the grounds that the awards in the judgment were in error since the respondent had failed to provide evidence on the claim for notice pay, service for years worked, underpayments, and the compensation awarded as without proof or reasons. The fact that the respondent absconded duty was not addressed which led to her terminating her employment hence not entitled to compensation. The appellant could not go looking for the respondent after she terminated her employment.
5. The appellant is seeking that the judgment of the trial court be set aside.
Both parties attended and filed written submissions.
6. The appellant submitted that the respondent filed the Memorandum of Claim on 6 April 2018 and amended the same on 4 December 2018 8 months later. There was no leave obtained to amend the claim and it ought to have been dismissed.
7. The claim that there was termination of employment was without evidence. The appellant admitted that the respondent terminated her employment when she absconded duty without due cause. The findings that there was unfair termination were in error since the appellant had nothing to do with the matter after the respondent walked out of her employment. In the case of *MacKenzie Maritime (E.A) Limited v Moses Ochola Juma* ELRCA No E073 of 2022 and [Nguda v Ready Consultancy Limited](#) Civil Appeal No 128 of 2019 the court held that the employee who is allowed to attend and defend herself and fails to do so cannot blame the employer. Given the opportunity for a disciplinary hearing, the respondent should have addressed this with the employer.
8. The appellant submitted that the respondent is not entitled to the awards in the judgments. Having absconded duty, notice pay and compensation are not due as held in [Nancy C. Maritim v Sot Tea Growers Sacco Limited](#) [2018] eKLR. The appeal should be allowed with costs.



9. The respondent submitted that the appellant fails to state the date her employment was terminated because she left employment voluntarily. While she claimed January 2018 was her last month of employment, no date is given. This inconsistency makes her evidence not credible. There are two witness statements which are not signed filed on 6 April 2018 and 4 December 2018. The allegations made were not proved because there was no report to the police about the serious allegations made.
10. The respondent submitted that the appellant testified that she reported the matter to the labour officer but no evidence was submitted. She did not deny that she was rude to her employer and broke the water dispenser and remained very combative. When questioned about her conduct, she opted to walk away. In the case of *Mackenzie Maritime (EA) Limited v Moses Ochola Juma* ELRCA No E073 of 2022 and *Nguda v Ready Consultancy Limited* Civil Appeal No 138 of 2019, the court held that an employee who fails to defend the matter facing him cannot blame the employer. Once given the opportunity to attend, the employee ought to attend and explain herself. In the case of *Carolynne Munala v Hoggers Limited* [2018] eKLR.
11. The appellant failed to address her gross misconduct and the remedies sought should not issue.

Determination

12. This being a first appeal, the court is required to re-evaluate the entire records, re-assess the finding, and arrive at its conclusion. However, regard must be taken that the trial court had the opportunity to hear the witnesses giving evidence.
13. The first issue that arises is the submissions by the appellant that the respondent filed an Amended Claim on 4 December 2018 without leave and the same should have been dismissed with costs.
14. The record is that the respondent filed the claim on 5 April 2018 before the lower court. Parties did nothing substantive until 10 June 2021 when the court addressed the application dated 8 June 2021.
15. Under Rule 14 of the *Employment and Labour Relations Court (Procedure) Rules, 2016* a party is allowed to amend the pleading before closing. There were no hearing directions in the matter until 4 November 2021. Such an intervening period allowed the respondent to amend pleadings.
17. On the challenged finding by the appellant, the appeal is that the respondent terminated her employment by walking out and refusing to return. As correctly addressed by the learned magistrate, the employee does not end their employment. An employee can only desert or abscond duty. Once such a matter arises, the legal duty is on the employer to act in terms of Section 44(3) and (4) of the *Employment Act, 2007* (the Act) read together with Section 41(2). Notice must be issued to the employee to attend and address such gross misconduct.
18. The employer must demonstrate the efforts taken to trace the employee who is said to have absconded duty or abandoned employment. Recourse is to the employment contract and the contact details therein, especially the contact address of the employee. The work records of the employee kept by the employer are also relevant.
19. Where the employee fails to attend despite issuance of notice sent to the last stated address in terms of Section 10(2) of the Act, the employer is mandated under Section 18 (5)(b) of the Act;
 - (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.

20. To leave the employee at large under alleged secondment of duty or desertion without any proactive steps to protect the employer results in a claim such as herein done. To this extent, the finding by the trial court cannot be faulted. There was termination of employment by the employer which was unfair for lack of adhering to the due process of the law or the employee being taken through the procedural requirements before employment terminated.
The respondent is entitled to notice pay as awarded.
21. The employee is entitled to compensation, save the same ought to have been with reasons. Whether to award the lowest or maximum allowed compensation is not a matter of course. Reasons leading to allocation of 8 months are required by Section 45(5) of the Act. the conduct of the employee, the record while in employment, and the reason(s) leading to termination of employment must come to bear at this point.
22. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of the maximum compensation must be based on sound judicial principles, and that the trial court must justify or explain why a claimant is entitled to the maximum award. The award must be explained. For example, in the case of *Ol Pejeta Ranching Limited v David Wanjau Muhoro* Civil Appeal No 42 of 2015, the Court of Appeal considered the conduct of the employee as a material aspect to reduce the award of compensation. See also, the case of *Gas Kenya Limited v Odhiambo* (Appeal E006 of 2022) [2022] eKLR.
23. The trial court had to hear the witnesses. There is nothing untoward addressed with regard to the respondent's work record. The lapse in giving reasons with regard to the allocation of 8 months' compensation can only be deduced from the fact that the respondent claimed that she had worked for the appellant from the year 2013 to 2018. This is 5 years. this still does not justify the allocation of 8 months. For lack of any rationale, an award of one (1) month's compensation at Kshs 8,000 is hereby found appropriate in compensation.
24. Termination of employment having been found unfair, notice pay is due claimed at Kshs 8,000.
25. On the claim for service pay, in evidence before the trial court, the appellant admitted that NSSF was not paid to the respondent. In terms of Section 35(5) and (6) of the Act, service pay is due on this admission.
26. The respondent claimed 16,000. She worked for the appellant from November 2013 to January 2018 for 5 years. The claimed amount is not in tandem with what is due. the respondent enjoyed legal representation and I take it, the claim as set out was on a good basis. The award of Kshs 16,000 is appropriate.
27. On the claim for underpayment awarded at Kshs 123,198.60, the details were not particularised over the years. I take it, that the respondent earned a wage of Kshs 8,000 per month from November 2013 to January 2018. The appellant did not offer any work records to challenge the paid amounts.
28. In November 2013, a house help in Mombasa had a minimum wage of Kshs 9,780.95 per month. The appellant confirmed that the respondent was accommodated in the residence and hence no house allowance is due.
29. From the due minimum wage, the respondent was paid Kshs 8,000 per month less what is due by Kshs 1,780.95 per month.



30. This was the subsisting position until new Wage Orders were issued on 1st May 2015. For 18 months the underpayment is Kshs 32,057.10.
31. The minimum wage changed to Kshs 10,954.70 a difference of Kshs 2,954.70 per month. For 24 months the wage remained constant and the underpayment until 1st May 2017 is Kshs 70,912.80.
32. From 1st May 2017 to January 2018 when employment ceased, the due wage was Kshs 12,926.55. the underpayment is $Kshs\ 4,926.55 \times 8 = 39,412.40$ in underpayments.
- The total due in underpayment is Kshs 142,382.
33. On the award of costs, these are discretionary and in employment, claims do not follow the cause. The award of costs after the employee is paid the owing dues must be for stated reasons. The appellant did not delve into the issue. Costs before the trial court are as awarded but in this appeal, each party to bear its own costs.
34. Accordingly, the appeal partially succeeds and the judgment in Mombasa MCC/ELRC No 1084 of 2019 is hereby reviewed in the following terms;
- a) Compensation Kshs 8,000;
 - b) Notice pay Kshs 8,000;
 - c) Underpayments Kshs 142,382;
 - d) Service pay Kshs 16,000;
 - e) For this appeal, each party is to pay its own costs. Costs before the lower court as awarded.

DELIVERED IN OPEN COURT AT MOMBASA THIS 14 DAY OF MARCH 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

