



**Owudu v Digital Sanitation Services Limited (Appeal E109 of 2023)
[2024] KEELRC 917 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 917 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E109 OF 2023
M MBARÚ, J
APRIL 18, 2024**

BETWEEN

PAUL OPIYO OWUDU APPELLANT

AND

DIGITAL SANITATION SERVICES LIMITED RESPONDENT

*(An appeal from the judgment of Hon. J. B. Kalo in Mombasa
CMEELRC No. E282 of 2022 delivered on 19 September 2023)*

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMEELRC No.E282 of 2022 delivered on 19 September 2023. The background of the appeal is a claim filed by the appellant on the grounds that he was employed by the respondent in October 2016 as a driver at a wage of Ksh.20, 000 per month. He worked until 9 May 2022 when his employment was terminated. He claimed that his employment was terminated unfairly. There was no notice or any valid reason for termination of employment or payment of terminal dues. The appellant claimed the following:
 1. Leave allowance for 5 years and 7 months Ksh.78,162;
 2. Service pay for 5 years and 7 months Ksh.55,830;
 3. House allowances for 5 years and 7 months at 15% Ksh.334,980;
 4. 12 months compensation Ksh.240,000;
 5. Certificate of service;
 6. Costs.



2. In response, the respondent denied the claims and that the appellant was employed as a driver but he engaged in illegal, fraudulent dishonest, and criminal activities. On 11 November 2021 at Lexo Energy Petrol Station, Mtwapa while driving motor vehicle no. KCE 181A, the appellant made the respondent pay Ksh.3, 000 for fuel through Mpesa but he demanded a refund of Ksh.1, 000. On 29 January 2022 the appellant at Moi Avenue Total Petro Station while driving motor vehicle no. KCE 181A he received Ksh.4, 000 but he signed the fuel book register he fueled Ksh.2, 000 only and demanded and was given the balance of Ksh.2, 000. On 5 February 2022, the appellant was paid Ksh.530 and previously had been paid Ksh.1, 500 via Mpesa by a client Eliza Mwanake for onward transmission to the respondent which he stole and did not disclose to the respondent; on 7 April 2022, the respondent held a meeting with the appellant and two other employees that is Rose Obare and Benerard Were, where the appellant's activities were discussed and a decision taken to give him annual leave to pave way for further investigations. On 11 April 2020, the respondent gave the appellant a warning over his illegal, fraudulent, and dishonest activities. On 9 May 2022, he reported back from annual leave but the respondent decided to extend it to allow for investigations and at the same time issued him another warning letter over his conduct but he rudely refused to receive it and walked out and protested that he was being harassed and was not interested in the job. He never resumed thereby absconding and terminating his employment. On 12 May 2022, the appellant came back and demanded payment of his salary but this had been sent to his bank account. He was asked to fill out the remaining leave forms and issued with a show cause notice dated 12 May 2022 but he declined and stated that he had terminated his employment and that he would file suit for his dues. Efforts to hand over the show cause notice and have the appellant respond were fruitless causing the respondent to submit it to the Labour Officer. The respondent also made a report of the illegal and fraudulent activities by the appellant to the police through OB No. 24/17/5/2022 which is pending investigations and when the police called him, he commenced these proceedings. The appellant had committed gross acts of misconduct, his matter was addressed pursuant to Section 44(4) (g) of the Employment Act, 2007 (the Act) and the claims made are not justified. The claim for leave is not due as the appellant had exhausted all his leave days. Service pay is not due as the respondent had complied with Section 35(5) of the Act and termination of employment is justified.
3. The learned magistrate delivered judgment and dismissed the appellant's case on the grounds that the appellant declined to be taken through the disciplinary process commenced by the respondent as the employer and then decided to abscond duty. His claim was found without merit and dismissed with costs.
4. Aggrieved by the judgment, the appellant filed this appeal on eleven (11) grounds. He urged the court to allow his claim and assess the terminal dues and costs.
5. The appellant's case is that he was not accorded a hearing by the respondent before the termination of his employment as required under Section 41 of the Act. The trial court erred in shifting the burden of proof and finding that the appellant had absconded duty whereas the respondent had failed to accord him a hearing. The alleged calls and messages sent were never produced in evidence and hence there was no demonstration that the respondent made any efforts to hear the appellant before termination of employment as required under Section 47(5) of the Act.
6. The appellant's case is also that the trial court failed to analyze the entire record and Section 45 of the Act. Leave pay due ought to have been awarded together with service pay. No work records were produced as required under Section 74 of the Act to prove that leave and service were paid. Hence the trial court failed to comply with Rule 28(2) of the Employment and Labour Relations Court (Procedure) Rules, 2016 in preparing the judgment.



7. The appeal is also on the grounds that a certificate of Service is due at the end of employment and this ought to have been awarded as claimed.
8. Both parties attended and agreed to address the appeal by way of written submissions. The appellant submitted that termination of employment was unfair and failed the due process and substantive justification. The appellant testified that on 9 May 2022, he was forced by the respondent to sign documents that he did not understand, and when he declined to sign he was directed to leave the premises. The trial court assumed that the documents the appellant refused to sign were the notice to show cause. The respondent's witness testified that the appellant refused to sign leave forms. Termination of employment was not based on any justified grounds and the respondent had the duty to prove it was for a justified reason.
9. The appellant submitted that the evidence submitted by the respondent against him is not authentic and cannot be confirmed as true. The letter from Total Energies was not directed at the respondent or the appellant. The allegations that there was theft by the appellant through fraudulent or illegal claims were never proved. In the case of *Kosgei v Metkei Multi-Purpose Co. Ltd* Civil Appeal No.95 of 2017, the court held that the burden of proof that the letters were sent to the appellant is on the respondent as the employer. In *Titus Musau Ndivau & Another v Waridi Limited* Cause No.903 of 2012 (Nairobi), the court held that a report of misconduct must be to the appropriate authority. It should not be causally addressed as the reason for termination of employment. In this case, the respondent failed to comply with Section 41 of the Act.
10. The appellant submitted that he did not abscond duty as alleged. Absconding duty and desertion are defined in the case of *Javan Kisoi Mulwa v SAA Interstate Traders (K) Ltd* [2018] eKLR where desertion takes place when the employee has no intention of resuming work. Absconding is when the employee fails to seek permission for work absence. For an employer to claim abscondment, this must be demonstrated and proved. In the case of *Stanley Omwoyo Onchwari v BOM Nakuru YMCA Secondary School* [2015] eKLR the court held that the employer must demonstrate what measures were put in place in tracing the employee is alleged to abscond duty. There was no evidence by the respondent in this regard. The remedies sought leave pay, house allowances, service pay, and compensation.

The claim for issuance of a Certificate of Service should have been granted with costs.
11. The respondent submitted that termination of employment was lawful and justified. The appellant had several cases of misconduct which resulted in forced leave to allow for investigations. When he resumed duty on 9 May 2022 his annual leave was extended and also issued with a notice to show cause over the misconduct but he refused to accept and walked out of his employment. Despite efforts to have the appellant attend and show cause, he became rude and refused to take instructions. The respondent produced the records as required under Section 44(4) (g) of the Act. The refusal to walk out of his employment resulted in the appellant terminating his employment. He stated as much that he had terminated his employment on the grounds that he was being harassed.
12. For the reasons of fraudulent transactions and negligence, the respondent reported to the police who called the appellant upon which this case is filed to avoid the obvious prosecution. This report is sufficient to prove that the appellant had committed serious acts of gross misconduct and despite the effort to bring him to account, he terminated his employment. In *Mackenzie Maritime (E.A) Limited v Moses Ochola Juma* ELRCA No. E073 of 2022 the court held that an employee who is invited to a disciplinary hearing and fails to attend to defend himself cannot turn around and blame an employer. In the case of *Ngunda v Ready Consultancy Limited* Civil Appeal No.128 of 2019 the court held that once the employee is given the opportunity to a hearing and he refuses to attend, the employer cannot



be blamed for termination of employment. In the case of *Chief Justice & Another v Khaemba* Civil Appeal No.522 of 2019 the court held that once an employee is given the opportunity for a hearing, he must attend to defend himself.

13. The respondent submitted that, by his conduct, the appellant failed to attend and show cause why his employment should not be terminated for gross misconduct. He had several warning letters at the time. He was a liar in court and the trial court properly analyzed the evidence and dismissed the suit with costs which should be confirmed and the appellant directed to pay costs. The suit was only filed as an afterthought following a police report over the act of fraud.
14. The respondent submitted that the claim for leave was not justified, the appellant had taken his leave days. Service pay is not due and house allowances were taken care of in the consolidated pay. Compensation is not due in a case where termination of employment is justified.

Determination

15. This is a first appeal. The court is required to re-evaluate and re-assess the entire record and make conclusions. However, the court is required to take into account the fact that the trial court had the benefit of hearing the parties in evidence.
16. The appellant has faulted the trial court for dismissing his suit with costs and for not analyzing his claims on merit.
17. First, an employee does not terminate his employment in a case of alleged abscondment. When faced with an employee who fails to attend work, the employer must issue notice to the employee to render an account over his misconduct. Where the employee persists and fails to abide by such directions, the employer is required to issue notice terminating employment or summary dismissal through the last known address of the employer.
18. Further, under Section 18(5) (b) of the *Act*, where the employer cannot trace the employee, notice must be issued to the Labour Officer and any terminal dues deposited in such office. Then, the employer has undertaken its legal duty to properly end employment.
19. In the case of *Richard Maingi v Wells Fargo Limited* [2017] eKLR and *Chispine Onguso Okinyi v Devki Steel Mills Limited* [2018] eKLR the court held that dismissal on account of desertion requires the employer to produce evidence showing reasonable steps were taken to contact the employee accused of desertion.
20. In the case of *Albanus Mbuithi Mutiso v Fresh Breeze Limited* Cause No.851 of 2017 the court held that where the employer alleges that the employee has absconded duty, the employer must demonstrate what steps were taken to bring the employee to account.
21. In this case, the appellant was alleged to be of various acts of misconduct. He was allowed to take his annual leave. Upon resuming duty on 9 May 2022 his annual leave was extended to allow for more investigations. He was also issued with a warning letter and another notice to show cause why disciplinary action should not be taken against him.
The evidence differs at this point.
22. On the one hand, the appellant alleges that his employment was terminated and he was directed to leave the premises.
23. On the other part, the respondent asserts that the appellant refused to accept the notices issued to him particularly the notice to show cause over his gross misconduct.



24. At the hearing before the trial court, the record is that what the appellant refused to acknowledge on 9 May 2022 is the annual leave allocation. The notice is filed in the Record of Appeal.
25. What is clear to the court is that the further allocation of annual leave was to allow the respondent to conduct further investigations into the appellant's alleged misconduct. This did not take place as he did not attend work. What followed was a notice dated 12 May 2022 on the grounds of Abandonment From Duty As A Driver.
26. This notice is to the appellant and his phone number. It is copied to the Labour Officer. However, this notice should and ought to have been sent to the appellant's last known address as defined under Section 10(2) of the Act. The physical or postal address indicated in the contract of service. A phone number is not as defined under the law. This may ease communication but where termination of employment may result due to non-attendance, the dictates of the law apply.
27. Even though an employee who fails to attend as directed by the employer commits gross misconduct which is contrary to Section 44(4) (e) of the Act, notice to the subject employee must be issued in accordance with Section 41(2) of the Act. Where the subject employee fails to attend or address, as analyzed above, such being an act of gross misconduct, the employer must issue a termination notice or summary dismissal notice and copy the Labour Officer. That terminates employment lawfully. The duty to end the employment relationship is on the employer.
28. In this case, where the appellant is alleged to have absconded duty, the assertion by the respondent that he walked out of his employment cannot suffice. The respondent held the legal duty to act on such conduct and terminate his employment. The notice dated 12 May 2022 is to the effect that urgently confirms whether you have resigned/absconded duty, otherwise, this is the way we have interpreted it. We wish to get your feedback by reporting back on or before four days ...
29. To this extent, the respondent failed its legal duty. Employment was terminated unlawfully. The claims made by the appellant ought to have been analyzed on the merits.
30. On the claim for compensation for unfair termination of employment, in assessing what is payable to the appellant, the court is required to take into account his work record. There are warnings and various acts of alleged misconduct. Even though the respondent failed to issue the notice terminating employment, the claimant had been sent on leave to allow for investigations over his workplace misconduct. Such matters are subject to criminal investigations and a police report is not contested.
31. Under the provisions of Section 45(5) of the Act, the court should take these records of the appellant. They are relevant. To assign compensation would be to reward the appellant over his acts of misconduct. In this regard zero (0) compensation is appropriate.
32. Leave claimed for 7 years and 5 months should be assessed in accordance with Section 28(4) of the Act. The appellant had just taken his annual leave at the time his employment terminated. He cannot claim further beyond the 18 months allowed under the law.
33. On the claim for house allowance, the appellant was employed as a driver. The respondent asserted that his wage of Ksh.20, 000 was all-inclusive.
34. A driver employed in Mombasa as of 1st May 2022 had a basic wage of Ksh.19, 668.30 and was entitled to a house allowance of 15% thereof all at Ksh.2, 959.20. Total gross pay Ksh.22, 627.50 as required under the applicable Wage Orders.
35. In May 2022, the appellant only worked for 5 days. On the gross wage, his house allowance underpayment is prorated at Ksh.493.20.



- 36. For the period of 1st May 2018 to 30 April 2022, the basic wage was Ksh.17, 561 per month. The due house allowance at 15% thereof is Ksh.2, 634.15. This amounted to an underpayment of the due house allowance of Ksh.195.15 per month. For 60 months, the appellant is entitled to Ksh.11, 709.
- 37. From 1st May 2016 to 30 April 2017 the basic wage was Ksh.16, 724.75. The appellant was paid above the minimum wage at Ksh.20, 000 per month. This wage well compensated him including house allowance due.
- 38. From October 2016 to 30 April 2017 the basic wage was Ksh.14, 173, 50 and the appellant was paid Ksh.20, 000 per month. This well compensated him. The total underpaid house allowance is Ksh.12, 202.
- 39. Service pay is only due when the employer fails to abide by the provisions of Section 35(5) and (6) of the Act. Part of the work records filed by the respondent as the employer is the NSSF statement. This is sufficient proof of compliance with the law and hence, service pay is not due as claimed.
- 40. Indeed, as submitted by the appellant, a Certificate of Service is due at the end of employment. The best practice is to have the employee attend and clear any liabilities and such a certificate should be issued.
- 41. On costs, the appeal partially succeed with regard to the finding that there was unfair termination of employment and the appellant is also entitled to part of his claims for a house allowance. On this basis, each party bears its costs for the appeal and the lower court proceedings.
- 42. Accordingly, the appeal is partially successful. The court finds there was unfair termination of employment and compensation is awarded at zero (0) amount; house allowance Ksh.12, 202; each party bears its costs for the appeal and proceedings in Mombasa CMELRC E282 of 2022.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18 DAY OF APRIL 2024.

M. MBARÚ JUDGE

In the presence of:

Court Assistant: Japhet

..... and

THE JUDICIARY OF KENYA

