



**Servicehub Global Enterprise Limited v Nkumu (Appeal E122 of 2024)
[2024] KEELRC 915 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 915 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E122 OF 2024**

**M MBARŪ, J
APRIL 18, 2024**

**BETWEEN
SERVICEHUB GLOBAL ENTERPRISE LIMITED APPELLANT
AND
FAITH NGECHÉ NKUMU RESPONDENT**

*(Being an appeal from the judgment of Hon. Harrison Adika Musa Sajide
in Mombasa CMELRC No.E131 of 2023 delivered on 27 September 2023)*

JUDGMENT

1. The appeal arises from the judgment in Mombasa CMELRC No.E131 of 2023 delivered on 27 September 2023. The appellant is seeking that the judgment be set aside and substituted with an order of stay dismissing the claim. Further, the appellant is seeking payment of costs.
2. The background of the appeal is a claim filed by the respondent on the grounds that she was employed by the appellant on 21st August 2021 and worked until 15 February 2023. Her employment was verbally terminated by Jackline Khafafa the supervisor when she requested maternity leave and the same was granted on the condition that she should never report back contrary to section 29 of the *Employment Act*, 2007. That this was summary dismissal without notice or hearing or payment of terminal dues. At the time the respondent was earning ksh.12, 300 per month which was an underpayment. There were no statutory remittances to NSSF or allocation of annual leave. The respondent claimed the following:
 1. 12 months compensation for unfair termination of employment Ksh.162,864;
 2. Underpayment for 18 months Ksh.19,080;
 3. Notice pay Ksh.13,572;



4. Service pay Ksh.13,572;
 5. Accrued leave for 2 years Ksh.27,144;
 6. Certificate of service;
 7. Costs.
3. In response, the appellant admitted the respondent was employed as a cleaner at the SGR Mombasa terminal but not as an employee and hence no employment contract was issued. Jackline Khafafa the alleged supervisor is not the appointing authority and has no powers to employ or terminate employment. There was no employment contract and the director was not aware of any engagement from the labour office that needed his attention. There was no termination of employment as alleged and the claims made are without proof. The respondent was fully paid her wages and never requested maternity leave formally and hence cannot justify her claims which should be dismissed with costs.
4. The learned magistrate heard the parties and in judgment made a finding that there was an employment relationship between the parties. The respondent's employment was terminated unfairly and the following awards were granted;
1. 12 months compensation Ksh.182,400;
 2. Notice pay Ksh.15,200;
 3. Service pay Ksh.7,600;
 4. Accrued leave Ksh.15,200;
 5. Costs and interests.
5. Aggrieved by the judgment, the appellant filed the Memorandum of Appeal on six (6) grounds that;
1. The learned magistrate erred in fact and in law in finding in favour of the claimant that the termination of the claimant's employment by the respondent was unlawful, malicious, and unprocedural and an infringement of his constitutional rights.
 2. The learned magistrate erred in fact and in law in finding in favour of the claimant by awarding maximum compensation for wrongful dismissal;
 3. The learned magistrate erred in fact by awarding the claimant damages for wrongful dismissal.
 4. The learned magistrate erred in fact and by awarding the claimant payment in lieu of notice.
 5. The learned magistrate erred in fact by awarding the claimant service pay.
 6. The learned magistrate erred in fact and law by awarding the claimant the prayers sought.
6. Both parties attended and agreed to address the appeal by way of written submissions.
7. The appellant submitted that the jurisdiction of the court on appeal is to re-evaluate the evidence before the trial court and the judgment and arrive at an independent judgment as held in *Bwire v Wayo & Sailoki* [2022] eKLR and in *Peters v Sunday Post Limited* [1959] EA.
8. The appellant submitted that the finding that there was an unfair termination of employment was erroneous and without any justification. The respondent testified in support of her case and alleged there was employment from October 2014 which is contrary to the evidence produced by the appellant in CR12 which demonstrates that registration was on 8 July 2020 way after the alleged date of



employment. The appellant called two witnesses, Gregory Nyongesa and Jackline Khafafa the senior administrative officer and supervisor respectively. These witnesses confirmed that the respondent was employed as a cleaner at the SGR station but denied the particulars of termination of employment, Khafafa admitted she was the supervisor but denied the alleged summary dismissal of the respondent. The respondent testified that she had a contract but was not produced. The appellant maintained that the respondent was employed as a casual employee whose services were taken on a needs basis meaning she was not required to work daily. Section 47(5) of the *Employment Act*, 2007 (the Act) required the respondent to prove there was unfair termination of employment which was not done and the appellant has no reason to justify termination of employment.

9. The appellant submitted that the burden of proof where there is alleged unfair termination of employment is on the employee. Once this is addressed the employer is required to justify the reasons leading to termination of employment under Section 43 of the Act. In *Hellen Wangari Wangechi v Carumera Muthini Gathua* [2005] eKLR the court held that no court should decide a case on the burden of proof if this can legitimately be avoided. The legal burden of proof is on he who alleges. In *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the court held that the employee had the burden of proof when he claimed unfair termination of employment.
10. The claim that there was verbal termination of employment was discounted by the evidence of Khafafa that she had never met with the respondent. Without the alleged contract issued to the respondent being produced, the claims made are without merit. Section 107(1) of the *Evidence Act* was not satisfied to confirm liability on the appellant as held in *Ndiema Samburi Soti v Elvis Kimtai Chepkeses* [2010] eKLR that where there is a conflict in the primary facts, the witness who alleges has the burden of proof.
11. The trial court hence erred in awarding the claims made. Service pay is not due as there were statutory payments as held in *Elijah Kipkoros Tonui v Nqara Opticians t/a Bright Eyes Limited* [2014] eKLR.
12. The respondent submitted that she was employed in August 2021 and dismissed on 15 February 2023 through verbal notice by Jackline Khafafa who was her supervisor. The appellant called Gregory Nyongesa the administrative officer who admitted the respondent was engaged as a cleaner. Jackline Khafafa admitted that the respondent and other employees demanded to be paid their salaries leading to termination of employment. The appellant then stopped remitting the wages due to the respondent.
13. Section 47(5) of the Act requires the employee to claim unfair termination of employment which then places the burden on the employer to justify the grounds leading to termination of employment. In the case of *Matsesho v Newtown Cause No.9 of 2019* the court held that under Section 41 of the Act, if an employer proposes to terminate employment, the due process of notice and hearing must be adhered to. In the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR the court held that the test is whether the action of the employer falls in the band of actions that would be considered reasonable in the circumstances. In this regard under Section 45 of the Act, the employer is bound to follow the due process before termination of employment. The duty rests with the employer to prove reasons leading to termination of employment. Failure to do so leads to unfair termination of employment as held in *Naqvi Syed Omar v Paramount Bank Limited & another* [2015] eKLR; *Jane Nyandiko v Kenya Commercial Bank Limited* [2017] eKLR.
14. The respondent submitted that without justification of the reasons leading to termination of employment, the reliefs sought by the respondent were correctly assessed and awarded by the trial court and should be confirmed with costs. Determination
15. As a first appeal, the court is mandated to re-evaluate the evidence before the trial court and its judgment and make conclusions as to whether or not to allow the appeal. To achieve this, a fresh



assessment of the entire record is necessary but taking into account, the court has no opportunity to hear the witnesses.

16. The issues which emerge for determination are; Whether there was an employment relationship; Whether there was termination of employment and if so, whether this was unfair; Whether the awards are justified.
17. The appellant has challenged the case by the respondent that there was an employment relationship. In evidence, the respondent testified that employment was in October 2014 while the appellant was only registered on 8 July 2020 way after the alleged employment.
18. In the Memorandum of Claim filed on 9 March 2023, the respondent pleaded that employment commenced on 21st August 2021 and terminated on 15 February 2023. In her evidence-in-chief before the trial court on 3 July 2023, the respondent testified that she was issued with a letter of employment but this remained with the employer. Jackeline Khafafa dismissed her verbally.
19. Upon cross-examination, the respondent testified that while at work, she would sign into a book and record kept by the appellant.
20. In response, the appellant pleaded that the respondent was engaged as a casual employee for cleaning duties. In the statement of Gregory Nyongesa, he admitted that the appellant is contracted to offer cleaning services at the SGR on a day-to-day basis and the respondent was well known to him as he recruited her as a cleaner at the SGR Mombasa terminal. The recruitment are usually by word of mouth. No employment contracts are issued since the nature of the employment is determined by the availability of work.
21. Under the Act, verbal employment is lawful and legitimate. An employer is allowed to engage an employee verbally but where such employment is continuous and not likely to end within a day, the employer has the legal burden to issue a written contract in terms of Sections 9 and 10 of the Act. To keep an employee on verbal terms of employment only works to the disadvantage of the employer. Where there is a claim such as was before the trial court, the court is bound to believe the employee whose rights are not secured under any written contract.
22. On the admission by the appellant's witness Mr. Gregory Nyongesa that he recruited the respondent as a cleaner, the fact of the employment relationship as established by the learned magistrate cannot be faulted.
23. On whether there was unfair termination of employment, under Section 47(5) of the Act, the obligation is on the employee to establish a prima facie evidence of unfair termination of employment. On the other hand, Section 43 of the Act places the burden of proof on the employer to justify grounds for termination of employment. Where the employer fails to do so, there is a presumption in law that the termination was unlawful.
24. Addressing this issue, the court in *Peter Otabong Ekisa v County Government of Busia* [2017] eKLR had this to say:-

The standard of proof is set out under Section 47(5) of the Act. In terms thereof, the employee shall adduce prima facie evidence that there was no valid reason to dismiss him from employment and once that is done the employer bears the burden of justifying the dismissal. In other words the respondent bears the evidential burden of rebuttal. If the



employer is unable to rebut the evidence by the claimant, then the employee is said to have proven that there was no valid reason to dismiss him on a balance of probabilities.

25. In the case of *Milano Electronics Limited v Dickson Nyasi Muhaso* [2021] eKLR the court reiterated this position and held that;

... sections 43, 45 and 47 of the *Employment Act*? These sections place the burden of justifying a termination on the employer. All that the law requires of an employee is to provide prima facie evidence of a wrongful termination. Once this is done, it is for the employer to provide evidence to demonstrate that the separation was lawful. To this extent, the *Employment Act* has reversed the concept of burden of proof as encapsulated in section 107 of the *Evidence Act* so as to adopt the reverse burden of proof.
26. Hence the reliance by the appellant on the motions of Section 107 of the *Evidence Act* is removed from proceedings before this court. The heavy reliance on decisions from the High Court also does not have much bearing on the jurisprudence of this court.
27. In this case, the respondent's case is that she asked for maternity leave which was allowed but Jackline Khefafa told her not to report back. She was cross-examined at length on the events of 15 February 2023. She testified that on the material day, she signed the book, she did not go to the labour office but was told to return her uniform which she did.
28. In his evidence, Gregory Nyongesa testified that the respondent left her employment on 15 February 2023. The appellant kept the attendance sheets which were treated as the master roll. The respondent had no contract but here NSSF dues were paid.
29. The duty to keep work records is on the employer. Whether these are casuals for an indeterminable period, Section 10(6) of the Act obligates the employer to keep work records. Once proceedings such as herein are commenced, the legal burden of proof of records rests on the employer under Section 10(7) of the Act.
30. In this regard, the respondent's assertion that there was an unfair termination of employment was not discounted by the appellant. This evidence established a prima facie case for unfair termination within the meaning of section 43 of the Act. The burden of proof shifted onto the appellant to justify the termination of employment. That the Appellant elected to offer a flat denial of the alleged termination by pleading there was no written contract of employment hence failing to discharge the burden of proof placed on it by sections 43 and 47 of the Act.
31. The learned magistrate well examined the facts before the court and arrived at a correct finding. The employment of the respondent was terminated unfairly and the claim for notice pay and compensation was justified.
32. On the awards, there is a claim for underpayment. It is not contested that the respondent was earning a wage of Ksh.12, 300 per month as a cleaner. Under the Wage Orders applicable in Mombasa from August 2021 to February 2023, the minimum wage until 30 April 2022, was ksh.13, 572.90. This wage was with the benefit of a 15% house allowance of Ksh. 2,035.90 total gross Ksh.15, 608.88.
33. The underpayment is Ksh.3, 308.88 per month from September 2021 to April 2022. A total of 8 months. The underpayment is Ksh.26, 471.08.
34. From 1st May 2022, the basic wage increased to Ksh.15, 201.65 per month with a 15% house allowance being Ksh.2, 280.25 gross wage of Ksh.17, 481.82. For the 9 months worked until February 2023, the underpayment is Ksh.5, 181.90 x 9 = 46.637.75.



35. The total underpayment is Ksh.73, 108.75.
36. The learned magistrate relied on Regulation of Wages (General) (Amendment) Order 2022 but assigned a lower basic wage. This must have been an oversight. The due minimum basic wage for a cleaner is with the benefit of a house allowance.
37. The gross wage due in notice pay is Ksh.17, 481.82.
38. The award of service pay is due when the employer fails to pay statutory due or is not in compliance with the provisions of Section 35(5) and (6) of the Act. The appellant confirmed that the respondent's dues to NSSF were remitted. Whether there was full compliance or not, the basis is that this was addressed. Any non-remittance for any period should be reported to the Labour Officer and the NSSF to initiate the sanctions due.
39. The award of service pay in this regard is not justified.
40. On the claim for pay for accrued leave, this is a right under Section 28 of the Act. With the employment relationship confirmed, the employer must assign annual leave. Where annual leave is not taken, the payment instead should be based on the basic wage and for 21 days for each year. For the 15 months, the respondent had a total of 33 days accrued annual leave. On the basic wage of 15,201.65, the total leave pay due is Ksh.16, 721.80.
41. On the award of 12 months compensation, the jurisprudence of the court and the court of appeal is now settled that to allocate the maximum 12 months upon a finding that there was unfair termination of employment, the court must give reasons and justify the allocation of the maximum.
42. The Court of Appeal in the case of *OI Pejeta Ranching Limited v David Wanjau Muhoro* [2017] eKLR in addressing the award of 12 months held that;

The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 months' pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not be capricious or whimsical. It should be exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations, which act then invites our intervention

43. The Supreme Court in *Kenfreight (E.A) Limited v Benson K. Nguti* [2019] eKLR held that;

On an award on damages, the Act limits the award a court of law can make to a maximum of 12 months' salary. In as much as the trial Court therefore does have a discretion in the quantum of damages to award for unfair or wrongful termination of employment, it must be guided by the principles and parameters set under sub-Section 4 of Section 49 of the *Employment Act*.

44. Hence, even where the court has the discretion to make an award of up to 12 months compensation, such discretion should be applied judicially and justified with cogent reasons.
45. In this case, the learned magistrate did not give any reasons or justification for allowing the maximum claim of 12 months in compensation. The respondent worked for the appellant for under two years. Within that period there were underpayments which are assessed and allocated. On the finding that



there was unfair termination of employment, an award of two months in compensation based on the last due gross wage is hereby found appropriate. Ksh. 17,481.82 X 2 total Ksh.34, 963.64.

46. A certificate of service is a legal right at the end of employment under Section 51 of the Act. This should be issued. The respondent testified that she was directed to return her uniform and she did. Upon such compliance, a Certificate of Service should be issued reflecting the period of employment.
47. On costs and interests, in employment and labour relations claims, costs are discretionary. Reasons for the allocation of costs or interests should be given. Even where a claim is successful, costs do not follow the cause. In this case, the appeal is largely without merit, the only costs due are as allocated to the respondent by the lower court without interests.
48. Accordingly, the appeal is hereby found without merits save the orders by the learned Magistrate in Mombasa CMELRC No.131 of 2023 are hereby reviewed in the following terms;
 1. Compensation Ksh.34,963.64;
 2. Notice pay Ksh. 17,481.82.
 3. Underpayments 73,108.75.
 4. Accrued leave 16,721.80.
 5. Costs for proceedings in the lower court without interests.

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

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

..... and

The Judiciary of Kenya

