



REPUBLIC OF KENYA



**Servicehub Global Enterprise v Muendo (Appeal E120 of 2023)
[2024] KEELRC 916 (KLR) (18 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 916 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E120 OF 2023
M MBARÚ, J
APRIL 18, 2024**

**BETWEEN
SERVICEHUB GLOBAL ENTERPRISE APPELLANT
AND
FRANCISCAR MUENI MUENDO RESPONDENT**

*(Being an appeal from the judgment of Hon. Harrison Adika Musa Sajide
in Mombasa CMELRC No.E130 of 2023 delivered on 28 August 2023)*

JUDGMENT

1. The background of this appeal is a claim filed by the respondent against the appellant in Mombasa CMELRC No. E130 of 2023. The claim was that the respondent was employed as a cleaner by the appellant in August 2021 but her employment was terminated through verbal notice on 15 August 2023. The respondent requested to be paid the January wages which had been delayed and instead, the appellant terminated her employment. There was no notice issued or reasons given for the summary dismissal. The respondent was earning a wage of Ksh.12, 300 monthly which was an underpayment. She claimed the following;
 1. 12 months compensation Ksh.162,864;
 2. Salary for 15 days worked in February 2023 Ksh.9,600;
 3. 18 months underpayments LKsh.22,896;
 4. Notice pay Ksh.13,572;
 5. Service pay for 2 years Ksh.13,572;
 6. Accrued leave for 2 years Ksh.27,144;



7. Certificate of service;
8. Costs.
2. The appellant admitted that the respondent was engaged as a cleaner stationed at the SGR Mombasa terminal but was not an employee hence no employment relationship in writing or verbal. Jackeline Khafafa was the supervisor and not the employer and had no power to terminate employment. The director of the respondent was not informed of the matter or engaged by the labour office and the claims made are not justified.
3. The learned magistrate heard the parties delivered judgment and allowed the entire claim save, the salary arrears for February 2023 had already been paid.
4. Aggrieved, the appellant filed the appeal on the grounds that the award of maximum compensation was not based on any justification or reasons since there was no employment relationship established and hence no proof of unfair termination of employment. The award of general damages for wrongful dismissal was not justified and notice pay is not due.
5. Service pay did not accrue upon remittance of statutory dues and the judgment should be set aside and claims dismissed.
6. Both parties attended and filed written submissions.
7. The appellant submitted that a first appellate court is required under Section 78 of the [Civil Procedure Act](#) to reassess the entire record and come to a different conclusion.
8. The respondent testified in support of her claim but failed to establish a prima facie case against the appellant that there was an unfair termination of employment. The appellant called two witnesses who testified that the respondent was recruited as a cleaner at the SGR Mombasa terminal and the other witness testified that she did not know the respondent as alleged. Jackeline Khafafa testified that as the supervisor, her role did not include termination of employment and never dismissed the respondent as alleged. The respondent was only hired on a needs basis when labour was required at the Mombasa SGR terminal.
9. This is explained by the different payments;
In January, the respondent was paid Ksh.14, 502; February, the respondent was paid Ksh.6, 696;
In March, there was no payment since the respondent did not report to work.
10. The alleged termination of employment was not particularized as required under Section 47(5) of the [Employment Act](#) to allow the appellant to justify the reasons as required under Section 43 of the Act. Without proof of a case of unfair termination of employment, the awards of compensation, and notice pay should not arise. Service pay only accrues where the employer fails to abide by the provisions of Section 35(5) of the Act. The appeal should be allowed as prayed.
11. The appellant relied on a list of cases including, Hellen Wangari Wangechi v Carumera Muthini Gathua [2005] eKLR; Stanley Maira Kaguongo v Isaac Kibiru Kahuthia [2022] eKLR; Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR.
12. The respondent submitted the appellant has admitted to the engagement of the respondent but failed to address the circumstances leading to termination of employment. This was done casually and without regard to the due process or the legal threshold under Sections 41, 43 and 44 of the [Employment Act](#), the appellant called Jackeline Khafafa as the witness who admitted that the



respondent together with other co-workers demanded to be paid their wages leading to termination of employment. This was not a justified ground and there was no payment of the due terminal dues.

13. The trial court heard the parties properly assessed the claims and made the awards which should be confirmed by this court. The respondent relied on the following cases, *Matsesho v Newton Cause No.9 of 2019*; *Galgalo Jarso Jillo v Agricultural Finance Corporation*.

Determination

14. This is a first appeal. The court must review the entire record and make its conclusions but take into account that the learned magistrate in his judgment had the opportunity to hear the parties in evidence.
15. This appeal is closely related to EMCA E122 of 2023 which I had the chance to write before this appeal. Although the facts are similar, there are a few differences hence the need to write a separate judgment.
16. Through the Memorandum of Response and the evidence by Gregory Nyongesa, there is an admission that the respondent was recruited as a cleaner by the appellant. The employment was based on an oral contract which is allowed under the *Employment Act*, 2007 (the Act). However, where the employee is not sourced for work that is not likely to end within the day, such an employee becomes protected with rights and benefits under the Act under the provisions of Section 37 of the Act.
17. The employer then is obligated to issue the employee with a written contract spelling out her duties, terms and conditions. The response that the respondent was employed on a needs basis hence the differences in the wages paid is not supported by evidence.
18. The legal duty to keep work records is on the employer. Whether one is under contract or on causal terms, such records are necessary.
19. The fact of payment of a monthly wage confirms that the respondent ceased being a casual employee who should be paid daily at the end of casual service as held in *Nanyuki Water & Sewage Company Limited v Benson Mwititi Ntiritu & 4 others [2018] eKLR*.
20. In the case of *Krystalline Salt Limited vs Kwekwe Mwakele & 67 Others [2017] eKLR* the Court defined an employee who works beyond the day and continues to offer services that are not likely to end;
21. The *Employment Act* recognizes four main types of contracts of service: contract for an unspecified period of time, for a specified period of time, for a specific task (piece work) and for casual employment.
...
22. The decision to elect which form of employment to go for, either as an employee or employer will depend on a number of factors, but the dominant consideration is, for the employee, the earnings and other physical conditions of employment, and on the other hand, savings for the employer.
23. Therefore, where the employer elects to keep an employee beyond the day, such an employee becomes protected in law. The employee has rights and benefits under the Act.
24. One such benefit is to enjoy the protections under Section 41 of the Act. Before termination of employment for any reasons including misconduct, the employee should be served notice and allowed a hearing. Even where there is gross misconduct, the employee is secured under Section 41(2) to be accorded a hearing and given reasons leading to the sanction of summary dismissal.
25. Under Section 47(5) of the Act, an employee who pleads unfair termination of employment then places the employer an obligation to justify why there was the termination of employment. In this case, the appellant failed to demonstrate what exactly happened after the events of 15 February 2023. Where



indeed the respondent demanded to be paid wages earned in January, having worked and offered her labours, such a claim was justified. Where the appellant was unable to pay for any given reasons, notice should and ought to have been issued to the respondent. To hold onto an employee's wages for work done is an act that frustrates the employment relationship, and is strictly forbidden under Sections 17 and 18 of the Act. For work done, the employee is entitled to the wages earned.

26. Khafafa testified that the respondent was not paid in March 2023 because there was no report at work. Indeed where the appellant expected the employee at work and the employee failed to show up, recourse was Section 44(4) of the Act. The appellant was entitled to issue notice to the respondent to explain this gross misconduct and where she failed to oblige, to issue notice of summary dismissal. These motions are meant to secure the employer from claims that there was a lapse in due process. The appellant should and ought to have brought a closure to the employment relationship through notice.
27. Without any effort to demonstrate what measures were taken against the respondent who is alleged to have failed to report back to work, the inaction resulted in unfair termination of employment.
28. The learned magistrate well assessed the facts, and the evidence and made a correct finding that there was an employment relationship and that employment was terminated unfairly.
29. Notice pay and compensation are due.
29. The respondent was earning ksh.12, 300 per month at the time employment terminated on 15 February 2023. Under the Regulation of Wages (General) (Amendment) Order, 2022 a cleaner had a basic minimum wage of ksh. Ksh.15, 201.65 per month with a 15% house allowance being Ksh.2, 280.25 gross wages of Ksh.17, 481.82. For the 9 months worked from 1st May 2022 until February 2023, the underpayment is Ksh.5, 181.90 x 9 = 46.637.75.
30. From August 2021 to 30 April 2022, the minimum wage 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.
31. 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.
The total due in underpayment is Ksh.73, 108.50.
32. An employee protected under Section 37 of the Act enjoys annual leave of 21 days each year. Any time covered before a full year is prorated. Leave pay is due for the time worked prorated in the 18 months to 33 days. On the last basic wage of Ksh.15, 201, the due leave pay is Ksh. 16,721.80.
33. Salary claimed for days worked is admitted as paid.
34. On the claim for service pay, Gregory Nyongesa in his witness statement casually mentioned that NSSF dues should not be claimed since the respondent was still in employment. Unlike the case in ELCRCA E122 of 2023 where there was an assertion that NSSF was paid partially, in this case, there is no effort to demonstrate such a matter. The provisions of Section 35(5) and (6) of the Act are meant to secure the employer from a claim for service pay. The benefit of service pay only accrues where the employer fails in their legal duty to deduct and remit statutory deductions.
35. In this case, without proof or any effort to demonstrate compliance with Section 35 of the Act, service pay is due. The respondent worked for under two years. Service pay is not prorated. 15 days' pay for a year is due at ksh.8, 554 in service pay.
36. On the award of 12 months, indeed as correctly submitted by the appellant, the learned magistrate ought to have justified the maximum award. Even though this is discretionary, such power ought to be with the given reasons. In the case of Kenya Broadcasting Corporation v Geoffrey Wakio [2019]



eKLR the court held that the discretion to award maximum compensation of 12 months' pay should be applied rarely and only in exceptional cases of gross injustice and upon sound judicial reasoning as held in *Lavington Security Guards Ltd v Orenge* (Appeal E018 of 2023) [2024] KEELRC 565 (KLR) (14 March 2024) (Judgment). This position is also reiterated in *Simba Corporation t/a Acacia Premier Hotel v Kirui* (Appeal E020 of 2023) [2024] KEELRC 413 (KLR) (29 February 2024) (Judgment).

37. In this case, the respondent had only served for under 2 years. She does not state how she mitigates loss of employment. The appellant immediately paid for days worked.
38. Compensation for unfair termination of employment is hereby awarded at two months all at Ksh.34,963.64.
39. Certificate of Service is a legal requirement under Section 51 of the Act.
40. Costs do not follow the cause in employment claims. Though discretionary, reasons for the award must be issued. In this case, only costs for the lower court proceedings are allocated without interest.
41. 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

