



REPUBLIC OF KENYA



**Pasta Enterprises v Mughondi (Appeal E060 of 2023)  
[2024] KEELRC 948 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 948 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E060 OF 2023**

**M MBARÚ, J  
APRIL 11, 2024**

**BETWEEN**

**PASTA ENTERPRISES ..... APPELLANT**

**AND**

**JAMES MUGHONDI ..... RESPONDENT**

*(Being an appeal from the judgment by Hon. A. N. Akee (SPR)  
delivered on 15 June 2023 in Mombasa CMELRC No. E468 of 2021)*

**JUDGMENT**

1. This appeal arises from the judgment in Mombasa CMELRC No. E468 of 2021 was delivered on 16 June 2023. The appellant is seeking to set aside the whole judgment and that judgment be entered that the amount admitted by the appellant be the only award.
2. The background to the appeal is a claim filed by the respondent on the grounds that he was employed by the appellant as the lubricant from October 2011 earning ksh.20, 000 per month. He worked until October 2019 when his employment was terminated through verbal notice. He claimed that he was unfairly terminated, he was underpaid, was never placed under NSSF and NHIF cover, he did not take annual leave or paid overtime. He claimed the following dues;
  - a. underpayments;
  - b. 12 months compensation Ksh.240,000;
  - c. Notice pay ksh.20,000;
  - d. Service pay Ksh.80,000;
  - e. Unpaid leave Ksh.111,998.88;



- f. Public holidays Ksh.117,332.16;
  - g. Overtime Ksh.2,351,976.48;
  - h. House allowance Ksh.288,000;
  - i. Costs.
3. In response, the appellant admitted there was employment but the respondent was earning ksh.14,000 per month. The respondent absented himself from duty most of the time and through a notice dated 2 October 2019 delivered on 3 Cooter 2019 his employment was terminated. Employment was terminated on account of the respondent's health. He was invited to the appellant's office but he declined to attend and hence the allegation of unfair termination of employment does not arise. Termination of employment had nothing to do with discipline and instead, it was on the grounds of ill-health and the fact that the respondent had attained the mandatory retirement age. The appellant offered to settle the respondent's terminal dues but he refused to collect the same and his claims should be dismissed.
4. The trial court heard the parties and in judgment made a finding that there was unfair termination of employment and made the following awards;
- a. Maximum compensation ksh.240,000;
  - b. One-month notice pay ksh.20,000;
  - c. Service pay ksh80,000;
  - d. Unpaid leave ksh.11,998.88;
  - e. Unpaid holidays ksh.117,332.16;
  - f. Overtime ksh.2,351,976.48;
  - g. House allowance Ksh.288,000;
  - h. Costs.

Aggrieved, the appellant filed the appeal on five (5) grounds;

1. The learned magistrate misinterpreted the provisions of Section 49 of the Employment Act when she awarded maximum compensation for unlawful termination when in fact the respondent had been retired on medical grounds and thus the issue of substantive test as captured cleared existed and the issue of procedural test could not arise as the respondent was not summarily dismissed to warrant the issue of charges.
2. The learned magistrate erred in fact and law as she never at all referred to the appellant's pleadings, evidence and submissions but simply held that the claim was undefended which was out rightly erroneous.
3. The learned magistrate erred in fact and in law in allowing the entire claim under the various heads as though the claimant was undefended against the weight of documentary and other evidence on record.
4. The learned magistrate erred in fact and in law when she shifted the balance and burden of proof under Sections 7 and 9 of the Evidence Act.



5. The learned magistrate misdirected herself on the applicable principles of law by failing to take into consideration and appreciate the submissions and authorities submitted to the court by the appellant.
5. On the appeal, both parties attended and agreed to address by way of written submissions.
6. The appellant submitted that the trial court erred in fact and law in finding that the claim before it was undefended and that the appellant had not entered an appearance. The Record of Appeal demonstrates the appellant defended the claim and filed witness statements and records of employment. This invites the court on appeal to re-evaluate the entire record and arrive at its assessment, the evidence that the respondent's employment was terminated on medical grounds is not contested. Evidence of ill health was submitted by the respondent in his evidence. He confirmed that he had been out of work for more than 2 years and the company continued to pay his wages. The record has a letter dated 28 June 2019 and a doctor's recommendation that the respondent be allocated light duties for 3 months. The respondent testified and confirmed that he had been allocated light duties. It was therefore an error for the trial court to award the maximum compensation without taking into account the circumstances of the case. The appellant complied with the guidelines outlined in the case of *Kennedy Nyaguncha Omanga v Bob Morgan Services Limited* [2013] eKLR. The appellant paid the respondent for 2 years without rendering any service. This was a mitigating factor as held in *Katana Kazi Mumbo v KK Group of Companies* [2021] eKLR.
7. The appellant submitted that on service pay, the respondent was a member of NSSF and NHIF. On public holidays, no evidence was called on the days worked. House allowance was paid in the wages paid as evidenced on the payment statements leading to an error. On these grounds, the appeal should be allowed with costs.
8. The respondent submitted that he was employed by the appellant from 22 September 2011 to October 2019 earning a wage of Ksh.20, 00 per month. His employment was terminated without prior notice, or any justified reasons. The trial court analysed the evidence and pleading and correctly assessed the awards which are justified based on pleadings, the law and the judicial precedence. Based on established irregularities and unprocedural termination of employment, the trial court awards should be confirmed and costs awarded. The respondent relied on the following cases – *Kemfro Africa Ltd v Lubia & Another* [1982-1988] 1KLR; *Victoria De Meeo v Abdullahi H. Khalil & Another* [1994] eKLR; *Jackson Muiriri Wathigo t/a Murtown Supermarket v Lilian Mutune* [2021] eKLR.

## **Determination**

9. This is a first appeal. the primary duty of the court is to re-evaluate, re-assess and analyse the entire record and make a determination as to whether the conclusions by the trial court should stand or not and to give reasons either way as held in the case of *Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR.
10. At the core of the appeal is the challenge that the trial court held that the respondent's claim was undefended and that there was no appearance. This is an apparent error on the record. On 15 September 2021, the appellant entered an appearance and filed a response and served the respondent. Part of the despondence was a witness statement and work records. The appellant denied the claims and asserted that the respondent had been absent from work and eventually admitted terminating his employment on account of ill health and upon attaining mandatory retirement age.
11. The proceedings before the trial court are evidence enough that the appellant was all along represented by its advocates and was present in court during the herring. On 29 November 2022, the respondent



testified in the presence of Mr Kirui for the appellant. The record also confirms that at the close of the respondent's case, the appellant called its witnesses, Riaz Abdulkarim Pasta, director. He was cross-examined by the respondent's advocate at length. How then did the trial court miss out on this evidence?

The omission of these facts by the trial court justifies the appeal herein.

12. The employment of the respondent by the appellant is not contested. Such subsisted from 22 September 2011 to October 2019 earning a wage of Ksh.20, 000 per month.
13. Through a letter dated 14 October 2019, the appellant terminated the respondent's employment on the reasons that he had not been attending work due to ill-health and that he had been away for more than the statutory requirement of sick off of one month and a half while on full pay. The appellant also noted that the respondent had attained 60 years of age in the year 2013. For these reasons, his employment was terminated. Further, the appellant offered to pay the following;
  - a. One month notice pay ksh.20,000;
  - b. Salary for September 2019 ksh.20,000;
  - c. Salary for 19 days in October 2019 ksh.9,333;
  - d. Leave for 17 days in 2015 to 2016 ksh.11,333;
  - e. Leave for 13 days in 2016/2017 Ksh.8,667;
  - f. Leave for 11 days from 2017 to 2018 Ksh.7, 333.

It is noted in the letter that the respondent refused to collect his terminal dues.

14. The trial court in addressing the issue as to whether employment was terminated lawfully held that the appellant failed to address the provisions of Section 43(2) of the *Employment Act*, 2007 (the Act). The respondent was not presented with any charges before termination of his employment and therefore, this was contrary to Section 41 of the Act and led to unfair termination of employment. He was then awarded the claims as outlined in the Memorandum of Claim.
15. In his evidence in chief on 29 November 2022, the respondent testified that he was employed by the appellant in the year 2011 aged 58 years. He also admitted he was issued with a notice terminating his employment but denied that it gave no reason at all. He only learnt later that the reasons were due to ill health and that he had turned 60 years old in the year 2013.
16. Upon cross-examination, the respondent admitted that he was sick and away from work for 2 years. He also confirmed that he needed to recover his physical health. He had medical records from Mwatate Sub-County Hospital and a recommendation that he should be assigned light duties. For the entire period he was absent, the appellant paid his full wages.
17. Section 30 of the Act gives the employee the right to enjoy sick leave on full pay. However, this should be for the first 7 days of sick leave. Subsequent 7 days should be on half pay. Any further absence on sick leave is at the discretion of the employer and upon production of the Medical Certificate.

The provisions of Section 30(1) and (2) outline as follows;

- (1) After two consecutive months of service with his employer, an employee shall be entitled to sick leave of not less than seven days with full pay and thereafter to sick leave of seven days with half pay, in each period of twelve consecutive months of service, subject to production by the



employee of a certificate of incapacity to work signed by a duly qualified medical practitioner or a person acting on the practitioner's behalf in charge of a dispensary or medical aid centre.

- (2) For an employee to be entitled to sick leave with full pay under subsection (1), the employee shall notify or cause to be notified as soon as is reasonably practicable his employer of his absence and the reasons for it.
18. The respondent filed his Medical records from Coast Province General Hospital, Taita Taveta County Department of Health Services, and Marangu Lutheran Hospital. He confirmed that while out of work due to ill health, the appellant paid his wages for two years.
19. Hence, by admitting receipt of the notice terminating his employment, therein were the reasons justifying the same? Were these reasons justified and valid? The respondent only contested that he was not told why his employment was terminated. He only learnt later about these reasons as relating to his ill health and the fact that he had attained 60 years in the year 2013.
20. Under the provisions of Section 43 of the Act, the appellant discharged its legal duty. There was notice and reasons. The respondent had been absent from work for over two years and the reason related to ill-health. He was paid in full for the entire period. Termination of employment was not a result of misconduct but ill-health and attainment of retirement age which lawfully terminated employment.
21. The appellants offered to pay in notice, days worked, leave days accrued but the respondent declined to collect. This was an error on the part of the respondent. These were his employment dues.
22. On the findings by the trial court that there was unfair termination of employment for lack of a charge to the respondent, that is not a legal requirement based on the facts of the case. Attaining the retirement age in itself is a lawful cause for ending the employment relationship. The fact of ill-health for over two years further justifies termination of employment for genuine and good cause.
- On the awards made, notice pay was already offered by the appellant.
23. Compensation is not due in a case where termination of employment is justified and for good cause.
24. Service pay is not available where the employer such as the appellant remitted and paid statutory dues for the respondent under Section 35(5) and (6) of the Act.
25. Leave days due to the respondent as well outlined in the letter dated 16 October 2019. He had accrued 17 days from 2015 to 2016; 13 days in 2016/2017; and 11 days from 2017 to 2018. These were cashed accordingly. The employer is the legal custodian of work records and the outlined facts were not contested.
26. On overtime, the respondent remained out of work for two years before the termination of his employment. His claim for overtime pay for the entire period of his employment is an exaggeration and cannot apply as claimed.
27. On the house allowance allocated, the respondent filed his payment statements together with his Memorandum of Claim. These include statements for January 2017, February 2018, June 2018, and February 2019. All bear evidence of a basic wage of Ksh. 17, 391 and a house allowance of Ksh.2, 609 per month. To allocate more house allowance is not justified.
28. On the issue of costs, the appeal is successful. The appellant had held onto the terminal dues for the respondent since 16 October 2019. These should be paid upon collection by the respondent on his own time. On these grounds, each party bears its costs.



29. Accordingly, the appeal is hereby allowed in its entirety. Judgment in Mombasa CMELRC No.E468 of 2021 is hereby set aside. The respondent shall attend and collect his terminal dues at his convenience. Each party bears its costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 11 DAY OF APRIL 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

