



**Abdulla v Crown Petroleum (K) Limited (Appeal E016 of 2024)  
[2024] KEELRC 1565 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1565 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E016 OF 2024**

**M MBARŪ, J  
JUNE 20, 2024**

**BETWEEN**

**ABDILJIHAD WARIO ABDULLA ..... APPELLANT**

**AND**

**CROWN PETROLIUM (K) LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. M. W. Wachira  
delivered 8 September 2023 in Mombasa CMELRC No. E016 of 2022)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 8 September 2023 in Mombasa CMELRC No. E016 of 2022. The appellant is seeking that the judgment be set aside with costs.
2. The background to this appeal is a claim filed by the appellant in the trial court. His case was that he was employed by the respondent as a truck driver at a wage of Ksh.31, 268. On 14 September 2021, the appellant drove back to work and was told to surrender his motor vehicle and leave. There was no notice, hearing or any reasons given. The reason given was that he had declined to sign an admission that he had carried an unauthorized passenger, an allegation that was without proof. He claimed that he was being frustrated in his duties and the respondent had created a hostile work environment to push him to resign. This amounted to constructive dismissal and unfair labour practices. He claimed the following dues;
  - a. Notice pay Ksh.35,221.60;
  - b. Unpaid leave for 4.5 years Ksh.158,497.20;
  - c. 12 months compensation Ksh.422,659.20;
  - d. Underpayment of wages



2019 to August 2021 (32 months)

$35,022.60 - 31,268 \times 32 = \text{Ksh.}126, 515.20;$

- e. General damages;
  - f. Costs of the suit.
3. In response, the respondent admitted that the appellant was an employee earning a wage of Ksh.31, 268 and the same was consolidated after all the statutory deductions including NSSF, NHIF and PAYE. The wage paid was inclusive of the house allowance. The appellant deserted duty on the morning of 14 September 2021 after engaging in misconduct of carrying unauthorized passengers on the allocated motor vehicle. He was summoned for a disciplinary hearing. It was established that the appellant had previously engaged in similar misconduct and a warning was issued. There was no constructive dismissal as alleged and employment was only terminated after the appellant refused to sign the warning letter and then deserted duty. Efforts to trace him were fruitless prompting the respondent to inform the Labour Officer through a letter dated 18 September 2021 that the appellant refused to sign the warning letter and that he had deserted duty. Notice pay and compensation are not due upon desertion of employment. The appellant took his annual leave in full and the wage paid of Ksh.31, 268 included statutory payments inclusive of house allowance and the claims should be dismissed with costs.
4. The learned magistrate in the judgment held that there was no constructive dismissal, employment terminated for good cause and hence dismissed the suit with costs.
5. Aggrieved by the judgment, the appellant filed the appeal on the grounds that;
- 1. The learned magistrate erred in law and fact by failing to make a finding on the appellant's claims on;
    - i. Unpaid leave;
    - ii. Underpayments;
    - iii. General damages;
    - iv. Interests on prayers.
  - 2. The learned magistrate erred in law and fact by failing to make a decision and or determine the appellant's reliefs sought;
    - i. Unpaid leave;
    - ii. Underpayments;
    - iii. General damages;
    - iv. Interests on prayers.
  - 3. The learned magistrate erred in law and fact by finding that the respondent did not prove that it contracted the claimant to bring the contract of employment to an end and again proceeded and dismissed the claimant's relief sought with costs to the respondent.
  - 4. The learned magistrate erred in law and fact by not finding that telling a driver to hand over the ignition truck key and not returning it to him and or giving him another one is the termination of his employment.



5. The learned trial magistrate erred in law and fact by not considering positively the appellant's substantive written submissions on point of law and fact other than the respondent's written submissions.
6. The learned magistrate erred in law and fact by dismissing the appellant's relief sought on his amended claim of 17 March 2023 with costs against the appellant.
6. On the appeal, both parties attended and agreed to address by way of written submissions which are analysed and the issues which emerge for determination are the following:
  - Whether the trial court failed to address the reliefs sought;
  - Whether the written submissions by the appellant were put into account;
  - Whether the findings by the trial court dismissing the claim were justified.
7. On the issue of whether the trial court considered the reliefs sought, the legal issue of termination of employment must be addressed to the fullest possible issue. Whether or not employment was terminated on the merits or was unfair, under the provisions of Section 18 of the *Employment Act, 2007* (the Act), the court must address each claim.
  - Under Section 18(4) of the Act, upon dismissal, the employer should pay all lawful dues;
  - (4) Where an employee is summarily dismissed for a lawful cause, the employee shall, on dismissal be paid all moneys, allowances and benefits due to him up to the date of his dismissal.
8. The appeal that the trial court erred in not addressing all the reliefs sought is correct. Upon the finding that there was no constructive dismissal or unfair termination of employment, the trial court should have analysed each claim on the merits.
9. On unpaid leave, this is a right under Section 28 of the Act. Where the employee has been allowed to take annual leave, the employer must keep work records and produce such records upon a claim has been filed in court under the provisions of Section 10(6) and (7) of the Act.
10. In this case, the Record of Appeal on pages 63 to 69 are leave application forms;
  - In February 2019 the appellant took 21 leave days;
  - In August 2019 the appellant took 14 leave days;
  - November 2019 the appellant took 9 leave days;
  - In April 2020 the appellant took 21 leave days;
  - September 2020 the appellant took 11 leave days.Cumulatively, the appellant was well secured under Section 28 of the Act.
11. Concerning underpayments, the appellant was a truck driver. He claimed that his wage ought to have been Ksh. 35,221.60 but he was paid Ksh. 31,268 per month which was an underpayment.
12. In his written submissions, the appellant's case was that the statutory minimum wage under the Minimum Wage Order is a Legal entitlement in Section 47(1) (a) of the *Labour Institutions Act*. As a heavy commercial driver, his basic wage was supposed to be Ksh.30, 627 plus a 15% house allowance of Ksh.4, 594.10 total being Ksh.35, 221.60 per month.



13. A truck driver working in Mombasa in September 2021 had a minimum wage of Ksh.30, 627.45 per month. Indeed, from this wage, a 15% house allowance was due total of Ksh.4, 594 and a total wage of Ksh.35, 221.60.
14. The respondent filed payment statements under pages 86 to 91 of the Record of Appeal. The following details emerge;  
Basic wage ksh.30, 621;  
House allowance Ksh, 4,596;  
Statutory deductions ...
15. The gross wage paid is in tandem with the minimum wage Orders and there is no underpayment.
16. On the claim for general damages, in the written submissions, there was no matter on this head. It was left empty. Even in a case where the appellant had claimed constructive dismissal, such a matter is not gone into this appeal.
17. On the claim for costs and interests, the award of costs in employment claims is discretionary as required under Section 12(4) of the *Employment and Labour Relations Court Act*, 2011. Where costs are awarded, reasons must be given. Where costs are not justified, reasons must be given.
18. In this regard, the claims made were found not justified and the claim was dismissed. The application for costs awarded to the respondent though without reasons, the discretion of the trial court in this regard is not stated as having been applied out of the guiding principles for proper adjudication of employment disputes.
19. On whether the trial court considered the written submissions by both parties, at the core of each dispute are the pleadings giving rise to the claim. Written submissions are of persuasive value but cannot change the core pleadings being the Memorandum of Claim or the Memorandum of Response. Both are the required materials under Rule 4 and Rule 13 of the Employment and Labour Relations Court (Procedure) Rules, 2016. Without strict compliance with these rules, a party cannot find justification that their written submissions are to fill any gap. These are but concluding submissions upon the pleadings, evidence and persuasive case law. Unlike a situation where parties agree to address a matter by way of written submissions, where there is a call for evidence, gaps therefrom cannot be filled through written submissions. Parties are bound by their pleadings.
20. The trial court dismissed the claim on the reason that there was no case of constructive dismissal. Further, the appellant was found to have deserted duty after refusing to accept the warning letter and further, that the remedies sought were not justified.
21. However, the learned magistrate upon making such an analysis held that;  
  
... in this case, the respondent did not prove that it contacted the claimant to bring the contract of employment to an end, the respondent being the innocent party has never informed the claimant that he has been dismissed or terminated, that being the case it then means that the contract of employment has not been put to an end by the respondent. There is no evidence by the claimant that he reported to work and he was turned off or that the respondent told him not to report to work after 14/09/2021. The claimant ought to go back to work where the respondent will determine whether to terminate his contract or otherwise. In the circumstances, I find there was no proof of termination of the employment contract or employment by the respondent.

These findings are not followed up with a remedy.



22. On the one hand, the appellant's case is that he reported to work and was sent away.
23. On the other hand, the respondent's case is that the appellant was called to answer to misconduct and he refused to sign for the warning and then deserted duty. They looked for him without any success. The matter was reported to the Labour Officer and also the issue of desertion of duty was reported to the Labour Officer.
24. Under pages 92 and 93 of the Record of Appeal, the respondent filed the notices served upon the Labour Officer. One relates to the appellant's deserting duty and the other relates to the termination of his employment.  
Under Section 18(5) (b) of the Act, the respondent discharged its legal duty;
  - (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.
25. Upon the desertion of duty, the employer is required to look for the employee and where the employee cannot be traced, such matter must be reported to the labour officer. Such a report insulates the employer from a claim such as done by the appellant. The respondent cannot be faulted after making its reports to the Labour Officer.
26. At the core of his case, the appellant claimed that he reported to work and was directed to hand over the truck keys. He complied but he asserted that he was coerced to sign a warning letter but he declined. The appellant does not refuse that he was issued with a warning letter after being found to have carried an unauthorized passenger.
28. It is gross misconduct for the employee to refuse to accept lawful instructions and directions of the employer. Once served with a warning letter, the appellant ought to have received the same and then challenged its contents. Refusal to accept notice from the employer is cause for summary dismissal.
29. It is then correct when he admitted in his evidence before the trial court that he had been issued a driver's manual and was not allowed to carry unauthorized passengers and he signed it. He admitted that carrying unauthorized passengers was the first issue for him. For this reason, he was issued with a letter dated 4 May 2020 and I didn't sign the letter.
30. Refusal to abide by the employer's instruction is tantamount to a breach of contract and is defined under Section 44(4) of the Act as gross misconduct subject to summary dismissal. The desertion of duty addressed above, the termination of employment was justified and notice was issued through the Labour Officer.
31. On the above analysis, the appeal herein is without merit, the same is hereby dismissed with costs to the respondent.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 20TH DAY OF JUNE 2024.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

**Court Assistant: Japhet**



..... **and** .....

