



**Kensalt Limited v Mwaruwa (Appeal E039 of 2023)
[2024] KEELRC 1367 (KLR) (6 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1367 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E039 OF 2023**

M MBARÚ, J

JUNE 6, 2024

BETWEEN

KENSALT LIMITED APPELLANT

AND

ELIAS LEWA MWARUWA RESPONDENT

JUDGMENT

1. The appeal herein arises from the judgment delivered on 6 April 2023 in Mombasa CMELRC No. 662 of 2019. Dissatisfied with the judgment, the appellant is seeking that the same be set aside in its entirety and be substituted with an order for dismissal with costs.
2. The background of the appeal was a claim filed by the respondent on the grounds that on 2 May 2007, he was employed by the appellant as a machine operator at a monthly wage of Ksh.18, 611. He worked until 20 September 2017 when his employment was terminated without notice, hearing or any good cause. He made the following;
 - a. 12 months compensation Ksh.223,332;
 - b. Notice pay Ksh.18,611;
 - c. September 2017 wage ksh.18,611;
 - d. Certificate of service;
 - e. Costs.
3. In response, the appellant admitted that the respondent was an employee but he was in breach of his employment terms and conditions and failed to do as directed or instructed and further refused to report on duty and continued to be absent. He was invited to show cause why his employment should not be terminated which led to lawful and justified termination of his employment.

4. The learned magistrate heard the parties and held that there was an unfair termination of employment and made awards as pleaded in the Memorandum of Claim. The awards are;
 - a. Compensation Ksh.223,332;
 - b. Notice pay Ksh.18,611;
 - c. Salary for September 2017 Ksh.18,611;
 - d. Certificate of service.
5. Aggrieved, the appellant filed the appeal on the grounds that;
 1. The learned trial magistrate erred in law and fact by awarding Ksh.260, 554 damages for wrongful dismissal/unfair termination when the respondent had not sufficiently demonstrated wrongful dismissal, or unfair termination by the appellant.
 2. The learned trial magistrate erred in law by holding that Section 49 of the *Employment Act* is inapplicable to the court contrary to judicial precedents that had applied the said section of the law in determining appropriate compensation for unfair termination.
 3. The learned trial magistrate erred in law and fact in failing to find that the appellant had a valid reason for the termination of the respondent despite finding in the judgment that the appellant was frustrated by the absenteeism of the respondent.
 4. The learned trial magistrate erred in law and fact in finding that the respondent's claim of Ksh.260, 554 was not opposed by the appellant despite clear pleadings, evidence and submissions of the appellant all of which opposed the respondent's claim.
 5. The learned magistrate erred in his statutory duty to justify why the respondent should be awarded 12 months' salary compensation and as such the award of Ksh.223, 332 was not based on sound judicial principles.
 6. The learned trial magistrate erred in law and fact by stretching the obligations of the appellant towards the respondent by faulting the appellant for not looking for the respondent who was absent from work. It was the responsibility of the respondent to inform the appellant of his absenteeism as a responsible employee had his absence been genuine.
6. On the appeal, the parties attended and agreed to address by way of written submissions.
7. The appellant submitted that the termination of the respondent's employment was lawful and justified. A disciplinary hearing was not possible because he deserted duty and efforts to trace him were in vain. This evidence was not challenged before the trial court. The respondent had the burden to prove that there was unfair termination of employment as alleged. The appellant relied on the case of *Namibia Broadcasting Corporation v Haushona* the court held that an employee has a duty not to be absent from work without permission of the employer. In *Thomas Dzomo Kirunga v Krystalline Salt Limited* [2020] eKLR the court held that where the employee admitted to being absent from work without permission that was sufficient ground for dismissal.
8. The appellant submitted that the trial court erred in finding that Section 49 of the *Employment Act* was not applicable. This is contrary to principles of the law and decisions of superior courts that in assessing the remedies, the court should be guided under Section 49 of the *Employment Act*. In *Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others* [2018] eKLR the court held that the compensatory damages for unfair termination of employment must be based on zero to 12 months

allowed under Section 49 of the Employment Act. The 12 months awarded to the respondent was not based on any judicial reasoning after the respondent had testified that he was absent from work due to illness without proof.

9. The respondent did not file any written submissions.

Determination

10. This is a first appeal. The court is called to review, re-assess and re-evaluate the record and make its conclusions as held in *Selle & Another v Associated Motor Boat Company Limited & Others* [1968] EA.
11. The employment of the respondent by the appellant is not contested. In his evidence before the trial court, the respondent confirmed that his last wage was Ksh.18, 611 per month and in January 2016 he deducted the sum of Ksh.134 for lateness and absenteeism. He admitted that he was not given permission by the appellant to be absent from work or to arrive late at work and in April 2016 he was deducted Ksh.144 for lateness and absenteeism.
12. The respondent was cross-examined at length on his conduct and testified that;

... In April 2016 I was deducted Ksh.144 for lateness and absenteeism. Lateness and absenteeism are not good for an employee. I used to sing in biometrically wherever I reported and left duty. Before 29th September 2017, I had been sick for one week. I have not produced documents to show I was sick on those days. ...
13. Absence from work without permission from the employer or good cause is addressed as a legal ground for summary dismissal under Section 44(4)(a) of the Employment Act, 2007 (the Act). Where the employee is absent from work, the employer must summon him within the provisions of Section 41(2) of the Act and have him show cause why his employment should not be terminated for such gross misconduct.
14. Where notice is issued to the employee to attend and address his gross misconduct, and the employee fails to attend, the employer must issue notice of summary dismissal. This notice must be sent to the last known address of the employee under Section 10(3) of the Act which requires the employer to keep the contracts of the employee. The defence that the appellant had no record of the whereabouts of the respondent is not a good justification. This only confirms the justification of the claim that the respondent was not issued with notice before the termination of employment.
15. Further, where the employer is forced to issue a notice of summary dismissal to the employee for continued absence, a copy thereof must be served upon the Labour Officer under Section 18(5) (b) of the Act;
 - (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.
16. The employee does not terminate his employment through absenteeism or abandonment of work. The employer must remain proactive and secure itself through the law. Absenteeism and absconding duty are acts of gross misconduct that must be addressed by the employer.

17. The learned magistrate analyzed the facts and the applicable law properly and, in this regard, arrived at correct findings. This court cannot fault the findings.
18. Such matters of admitted absence from work and alleged illness without any Certificate from a doctor only apply in the court assessing the compensation due to the employee as required under Section 45(5) (b) of the Act. The work records of the employee that in January 2026 he was absent and was deducted Ksh.134 due to absence and in April 2016 he was deducted Ksh.144 for being absent must come to bear at the end of the day.
19. In assessing the remedies due to the employee, the learned magistrate ought and should have applied such a matter.
20. The jurisprudence of the court is that, upon finding that the employee was unfairly terminated in his employment; in allocating the compensation, the court has the discretion to allocate compensation but must apply the provisions of Section 45(5) of the Act and give reasons for assigning between zero to 12 months wages/salary. In this regard, the respondent had claimed 12 12-month award in compensation which was awarded. No reasons are given for awarding the maximum and such a gap allows this court to interfere with the same as held in the case of *Olute v County Government of Siaya & another (Employment and Labour Relations Cause E059 of 2021)* [2022].
21. In *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR the court pointed out that an award of a maximum of 12 months' pay must be based on sound judicial principles, and that the trial judge must justify or explain why a Claimant is entitled to the maximum award.
22. The conduct of the respondent taken into account, the fact that he had been surcharged for being late at work and that he had been absent from work for alleged illness without submitting any evidence, the award of 12 months maximum compensation should factor these matters. The respondent worked for the appellant from the year 2007 and 2017. This is a long period of consistent employment. An award of 6 months gross wage is hereby found an appropriate compensation. The respondent was earning Ksh.18, 611 x 6 total compensation is Ksh.111, 666.
23. With regard to the application of Section 49 of the Act, indeed, the entire section has an outline of the reliefs that the court may award in a single form or multiple forms as held by the Supreme Court in the case of *Kenfreight (EA) Limited v Benson K Nguti* [2018] eKLR.
24. In this regard, Section 49(1) of the Act provides that;
 - (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following— [underline added].
25. The learned magistrate in concluding his findings held that the provisions of Section 49(4)(f) ... the plain reading of the section shows that it relates to the role of the labour officer in cases of dismissal and unfair termination. ...
26. The court is the primary forum for litigation. The original jurisdiction to hear employment and labour disputes vests in and with the court. Under the mandate of the Chief Justice conferred under Section 29 of the *Employment and Labour Relations Court Act, 2011* read together with Article 48 of *the Constitution* on access to justice, special jurisdiction is given to magistrates to hear and determine employment disputes.

27. In this regard, the court appreciates that before employment claims reach the court, parties are allowed to negotiate and seek the assistance of the Labour Officer who is allowed under the law to arbitrate with a finding. This does not remove the jurisdiction of the court to hear and determine employment claims.
28. In this regard, the application of Section 49(4) (f) which reads that;
 - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
29. This matter only arises when the court is considering whether or not to award the remedies sought by a claimant. The element of reasonable expectation of the employee is one of the matters the court must consider before making any award based on the various remedies available under Section 49(4) of the Act. This is not the only reserve of the labour officer.
30. To this extent, the learned magistrate's findings must be seen in context. In addressing an employment claim, the full motions of Section 49(4) of the Act are available to the court to consider when addressing the claim. Once pleaded, the court is bound to consider the remedies available under the law.
31. In this regard, Section 49(4) of the Act must be seen as a whole and only applies after a finding of unlawful dismissal. Such a finding only accrues from the court and not from a labour officer. This is the rationale in the case of *Kenya Ports Authority v Munyao & 4 others (Petition E008 of 2023)* [2023] KESC 112 (KLR) (Civ) (28 December 2023) (Judgment).
32. This position is also reiterated in *Ken Freight (EA) Limited v Benson K Nguti SC Pet No 37 of 2018* [2019] eKLR where the court explained the applicability of the provisions of section 49 as follows;

... What then should be the correct award on damages be based on? Having keenly perused the provisions of section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy? The Act does provide for a number of remedies for unlawful or wrongful termination under Section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a court of law, and where a court found the same to be unfair or wrongful, section 49 applies. ...
33. The awards by the learned magistrate were well assessed, and the appeal succeeded with regard to the compensation awarded and hereby reviewed to Ksh.111, 666. For having failed to issue notice to the respondent before termination of employment, the award of notice pay is justified at ksh.18, 611.
34. The award of a Certificate of Service is lawful and cannot be faulted. This is due under Section 51 of the Act.
35. About payment for days worked in September 2017, this is due as the respondent should be paid for days worked. However, his employment was terminated on 20 September 2017. Payment should be for the total number of days worked at Ksh.12, 407.30.
36. On costs, the appeal is partially successful and for this reason, each party bears its costs.
37. Accordingly, the judgment in Mombasa CMELRC No.622 of 2019 is hereby reviewed in the following terms;
 - a. Compensation Ksh.111,666;

- b. Notice pay Ksh.18,611;
- c. Pay for September 2017 Ksh.12,409.30;
- d. Certificate of service;
- e. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 6 DAY OF JUNE 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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