



**Roadtainers Mombasa Limited v Tsuma (Appeal E078 of 2024)  
[2024] KEELRC 2316 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2316 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E078 OF 2024  
M MBARŪ, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**ROADTAINERS MOMBASA LIMITED ..... APPELLANT**

**AND**

**CHOGA TSUMA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Noelyne Reuben in  
Mombasa CMEELRC No.E470 of 2021 delivered on 25 March 2024)*

**JUDGMENT**

1. This appeal arises from the judgment delivered in Mombasa CMEELRC No.E470 of 2021 on 25 March 2024. The appellant is seeking that the judgment be set aside with costs.
2. The impugned judgment resulted from a claim filed by the respondent herein on the basis that he was employed by the appellant on 1<sup>st</sup> January 2017 as a heavy commercial truck driver earning a wage of Ksh.29, 169 per month. On 5 January 2021, he reported to work and his employment was verbally terminated without notice of any justifiable cause or payment of his terminal dues following unfair termination of his employment. He claimed the following;
  - a. Underpayments Ksh.290,592;
  - b. 12 months compensation Ksh.422,676;
  - c. Notice pay Ksh.35,223;
  - d. Service pay Ksh.70,446;
  - e. Unpaid leave Ksh.98,624.04;
  - f. Public holidays Ksh.103,320.08;



- g. Overtime Ksh.1,380,741.06;
  - h. House allowance Ksh.253,605.06;
  - i. Certificate of service;
  - j. Costs of the suit.
3. The appellant in response admitted that the respondent was employed as a heavy commercial driver but denied the claims made that there was unfair termination of employment as alleged. The respondent was driving his designated truck KBV 816U which was involved in a self-involving accident on 5 January 2021 where he was found to be carelessly driving it and it overturned at Bahari Centre along Eldoret-Webuye road. He also sustained injuries from the accident. He was negligent and caused the respondent to suffer loss and damage through payment of his medical bill, breakdown and recovery services, payment of salaries while the respondent was on sick leave and extensive damage to the truck. The respondent was invited to show cause for his actions but he left employment never to return. At the time, the respondent had several disciplinary cases and despite being warned, he failed to change and the claims made should be dismissed.
4. The appellant also counterclaimed on the basis that the respondent breached the code of conduct for employees. He drove the assigned motor vehicle carelessly causing it to overturn and failing to protect the cargo he was carrying. The appellant suffered loss and damage is claimed for;
- a. Breakdown and recovery charges;
  - b. Loss of business while the truck was under repairs;
  - c. Need to change cargo entry documents;
  - d. Failing to deliver goods in time as a result of changes in entry documents
  - e. Need to solicit for a replacement driver after the desertion of the respondent;
  - f. Pay in lieu of notice
5. The counterclaim is for payment of general damages for lost business and breach of contract and Ksh.35, 223 in notice pay and costs.
6. The learned magistrate heard the parties and in the judgment delivered on 25 March 2024 held that the respondent had proved his case on a balance of probabilities and termination of employment was procedural and judgment allowed as pleaded.

Aggrieved, the appellant has eight (8) grounds of appeal;

- a. The learned magistrate erred in law and fact by finding that the respondent was unfairly terminated by the appellant when there was insufficient evidence on record.
- b. The learned magistrate erred in law and fact by failing to consider the appellant's evidence on record that demonstrated the respondent was still an employee of the appellant and received salaries and other benefits in January and February 2021, a period he alleges to have been terminated.
- c. The learned magistrate erred in law and fact by failing to consider the appellant's evidence on record that demonstrates that the respondent absconded duties.



- d. The learned magistrate erred in law and fact by awarding the respondent Ksh.2, 000,000 as compensation for wrongful dismissal.
  - e. The learned magistrate misdirected herself and based her findings on the wrong precedents and failed to appreciate that the appellant had incurred losses in its counterclaim.
  - f. The learned magistrate erred in law and fact when she failed to award the appellant the amount prayed in the counterclaim.
  - g. The learned magistrate erred in law and fact when she misdirected herself by failing to fully consider the oral and documentary evidence on record and failing to consider and appreciate the witness statements filed by the appellant and written submissions and the relevant laws and case law cited.
  - h. The learned magistrate erred in law and fact by failing to consider the appellant's evidence on record and submissions thereby arriving at a wrong decision.
7. Both parties agreed to address the appeal by way of written submissions.
  8. The appellant submitted that claims made by the respondent had no merit and properly assessed should have been dismissed with costs. The claim for overtime had no evidence and the respondent was paid according to the minimum wage orders. The respondent admitted in evidence that he took his annual leave, and submitted pay slips indicating payment of a house allowance. His leave was encashed for 24 days.
  9. The respondent absconded duty and there was no unfair termination of employment as alleged. In the case of *Jasan Kisoi Mulwa v SAA Interstate Traders (K) Ltd* [2018] eKLR the court held where there is desertion, the employee has no intention of returning to work. Under Section 44(4) (a) of the *Employment Act*, an employee who has deserted duty is liable for summary dismissal. The appellant paid the respondent until February 2021 and his allegations that his employment was terminated in January 2021 only demonstrate that he deserted duty as held in *Daniel Mueke v Biogas Auto World* [2014] eKLR. There existed valid and genuine reasons leading to the termination of employment. The respondent made reasonable efforts to trace the respondent without success. On 22 February 2021, a disciplinary hearing was held against the respondent but he remained absent.
  10. The appellant submitted that the respondent had a self-involving accident while driving the appellant's motor vehicle KBH 928P on 14 October 2020 and another accident on 7 January 2021 while driving motor vehicle KBV 816U. A disciplinary hearing was called but he failed to show up. On 29 January 2021, a notice to show cause was issued and the respondent admitted that he was involved in an accident. On 23 February 2021, a warning was issued. Previously on 23 February 2020, the respondent had been issued with a warning for reckless driving. On 26 February 2020, he was invited to show cause why disciplinary action should not be taken against him. The background was replete with warning letters which demonstrate the respondent was not a diligent employee as alleged.
  11. The trial court failed to evaluate the evidence properly and hence arrived at erroneous findings and awards which should be set aside.
  12. The respondent submitted that it is not in dispute that the respondent was employed as a commercial truck driver earning ksh.29, 169 per month but his employment was verbally terminated on 5 January 2021. There was no notice hearing or payment of terminal dues. During his employment, the respondent was underpaid, he was not allowed to take annual leave, he worked overtime, his house allowance was not paid and the trial court made a proper analysis and awarded as claimed.



13. The respondent relied on the following cases, [\*Donald Odeke v Fidelity Security Limited Cause No.1998 of 2011\*](#); Josephine M Akinyi v Farhiyo Mohamed Cause No.148 of 2018; Francis Maina Kamau v Lee Construction [2014] eKLR.

### **Determination**

14. This is a first appeal. A first appellate court is mandated to re-evaluate the evidence before the trial court as well as the judgment and arrive at its independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity to see and hear the witnesses first-hand. This duty was stated in *Selle & another v Associated Motor Boat Co. Ltd.& others*.
15. The respondent's case before the trial court was that he worked as a commercial truck driver for the appellant earning Ksh.29, 169 per month but on 5 January 2021, his employment was unfairly terminated.
16. The appellant asserts that the respondent had a self-involving accident on 5 January 2021 along Eldoret-Webuye road while driving KBV 816U, he caused loss and damage to the appellant, he was injured in the accident and was paid his wages for January and February 2021 and then absented himself from duty.  
The appellant counterclaimed for the loss and damage.
17. During the hearing, the respondent admitted that he had a self-involving accident. That he resulted in work on 19 January 2021 but was not paid for January to March 2021 when he was denied access to the premises on 23 March 2021. He admitted that at the time, he was earning Ksh.33, 544 per month.
18. Upon cross-examination, the respondent admitted that he filed his pay slips for January and February 2021 as evidence of payment of his wages. He was paid for days he did not take annual leave.
19. In response, the appellant submitted various work records. These included disciplinary notices to the respondent.
20. In the notice dated 23 January 2021, the respondent was invited to show cause why disciplinary action should not be taken against him for causing an accident while driving motor vehicle no. KBV 816U.
21. This notice is indicated as having been received by the respondent but the date of receipt is not indicated.
22. A similar notice dated 29 January 2021 was issued to the respondent. Again, the date of receipt is not indicated.
23. However, there was a response by the respondent on 23 February 2021 that while he had been assigned to drive vehicle KBH 128, he did as was directed.
24. Another response dated 1<sup>st</sup> February 2021 indicates that while the respondent was driving KBV 816U, it developed mechanical problems near Eldoret and overturned.
25. The appellant also filed disciplinary hearing minutes for 22 February 2021 where the respondent is indicted to have been invited but failed to attend, the matter at hand was adjourned to allow the respondent's whereabouts to be established since he could not be reached on the phone.
26. As noted above, the notices to the respondent do not indicate when they were issued to him.



27. The appellant filed medical treatment notes for the respondent indicating admission to the hospital for treatment after the accident while driving KBV 816U.
28. The learned magistrate in the judgment analyzed the evidence and held that on a claim that there is unfair termination of employment, the employer is required to demonstrate the reasons leading to such action in terms of Section 47(5) of the *Employment Act*. Under Sections 43 and 45 of the *Employment Act*, the employer must show that the reasons given are valid and fair which was lacking in this case. That the allegations that the respondent absented himself from duty had no evidence.
29. Indeed, even where an employee has committed gross misconduct and remained absent from duty without permission, the employer has the right to dismiss the employee under Section 44(4)(a) of the *Employment Act* but upon meeting the conditions under Section 41(2) of the Act. The employee must be issued with notice and allowed to attend with another employee of his choice and be allowed to make his representations. In the case of *John Jaoko Othino v Intrahealth International* [2022] eKLR the court held that even in a serious case of gross misconduct, the employee is entitled to the protections of the law. This position is reiterated in the case of *Pheoby Aloo Inyanga v Stockwell One Homes Management Limited & another* [2022] eKLR.
30. The Court of Appeal in the case of *Prof. Macha Isunde v Lavington Security Guards Limited* [2017] eKLR, held that;

There can be no doubt that the Act, which was enacted in 2007, places a heavy obligation on the employers in matters of summary dismissal (Emphasis mine) for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (section 43) – and prove that the grounds are justified (section 47 (5), among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.

In this case, without evidence that the appellant issued the respondent with notices to attend a disciplinary hearing on 16 or 29 February 2021 or on any other date, to allege that he remained absent from duty without justification is to avoid the obvious. The fact of being absent from work without permission was not acted upon under the law. Such being a matter of gross misconduct, the appellant should have issued the respondent with notice to attend. Where the respondent failed to attend, the appellant had the legal duty to terminate employment under Section 44 of the *Employment Act* read together with Section 18(5) (b) of the *Employment Act*;

- (5) Upon the termination of a contract of service—
  - (a) ...
  - (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.

31. Take a proactive step, issue notice terminating employment on the reasons that the respondent was absent from duty without good cause and serve such notice to the labour officer in the event the



employee could not be reached or was not responsive to the notices issued. In the appellant's case, the respondent had responded to notices through his responses dated 23 February 2021 and 1<sup>st</sup> February 2021, the contents in these responses are not particular explanation letters to matters outlined in the notices to show cause.

32. Without proof that the respondent received these notices to show cause and to attend a disciplinary hearing on 22 February 2021, there is no justification that he had terminated employment by desertion or being absent without good cause. In any event, the disciplinary hearing on 22 February 2021 did not end with any sanction. It allowed the respondent more time to attend to his duties. There is no conclusive resolution.
33. Without the appellant completing the circuit of employment and events unfolding from 5 January 2021 after the respondent had an accident, the court finds there was an unfair termination of employment. Termination of employment was without lawful procedure.  
The award of notice pay is justified.
34. In assessing the compensation due, the court should be guided under Section 45(5) of the [Employment Act](#). The work record of the employee, and the procedures undertaken to bring him to account, cumulatively, these come to bear.
35. The appellant has filed a litany of warning letters and cases of gross misconduct on the part of the respondent. The incident leading to the termination of employment was a self-involving accident where the respondent caused damage and loss to the appellant. He admitted that while driving Motor vehicle KBV 816U, he had an accident near Eldoret. He was admitted to the hospital and the appellant was forced to seek alternatives at great costs. Before this accident, the respondent had another accident in the year 2020 involving another vehicle at a great loss to the appellant. Before these two accidents, the respondent had several warning letters issued with regard to the performance of his duties. He has not denied these warnings.
36. To assign and award the respondent maximum compensation at 12 months gross wage is without any justification. The trial court does not give the special circumstances that justified the allocation of a maximum available award in a case that is replete with cases of gross misconduct. Despite the appellant failing to issue notice to the respondent to attend a disciplinary hearing, his work record is put in context, and this court finds an award of one (1) month gross wage as sufficient.
37. The trial court also proceeded to confirm all awards generally without assessment of how each claim arose. This is an error. Each claim, whether there was unfair termination or not should be gone into and assessed and allocated accordingly.
38. The claim for underpayment is on the basis that the respondent was a heavy commercial truck driver and his wage should have been 35,223 and not 29,169.
39. The appellant filed the contract of employment from the year 2018. The respondent was defined as a Heavy Commercial Driver. His wage is Ksh.33, 544.
40. Under the applicable Wage Orders, the respondent had a minimum wage of Ksh.30, 627.45 and a 15% house allowance of Ksh.4, 594.20 gross wage is Ksh.35, 221.15.  
There is an underpayment of Ksh.1, 677.15.
41. On the claim of underpayments for 48 months, the respondent is entitled to Ksh.80, 501.64.  
On the due wage of Ksh.35, 221.15 notice pay is thus due.



- On the due wage, compensation is due at Ksh.35, 221.15.
42. On the claim for service pay, the respondent filed his payment statements. The appellant deducted and remitted statutory dues and hence complied with Section 35(6) of the Employment Act.
  43. On the claim for unpaid leave days for 4 years, the respondent admitted that his leave was encashed for one year. The appellant filed a leave application form and approval for December 2020 for 24 days and October 2020 for 24 days. Leave days due under the provisions of Section 28(4) of the Employment Act and are properly allocated.
  44. On the claim for working during public holidays, these days are not particularized. Each public holiday is published by the Minister. These are not general days for a general claim. The award by the trial court is in error.
  45. On the claim for overtime, the respondent's case was that he worked for 7 days each week with overtime of 4 hours. He did a multiplier of 48 months the total period of his employment by the appellant. This multiplier fails to take into account the days taken for annual leave. The application of a general claim for 4 hours each day for 48 months is a gross exaggeration which denies the respondent what he is seeking.
  46. On the claim for house allowance, this is addressed under the claim for underpayments.
  47. The claim for a certificate of service is justified. At the end of employment, this certificate should be issued under the provisions of Section 51 of the Employment Act.
  48. On the counterclaim, the ripple effect of the appellant failing to take the respondent through the due process and particularly the failure to invite him to attend the disciplinary hearing denied him a fair chance to address the counterclaim. The appellant does not go into the kind of costs incurred as concerns Breakdown and recovery charges; Loss of business while the truck was under repairs; costs for change cargo entry documents; costs for delivery of goods in time as a result of changes in entry documents; and costs for replacement driver after the desertion of the respondent.
  49. Save to claim for notice pay at the Ksh.35, 233 the appellant failed to articulate its case. The fair procedure cuts both ways. The particulars of the appellant's counterclaim should have been addressed to allow the respondent to answer thereto.  
The court finds no merit in the counterclaim.
  50. On costs, the appeal is partially successful. To balance rights, each party bears its costs.
  51. Accordingly, the judgment in Mombasa CMELRC No.E470 of 2021 is hereby reviewed in the following terms;
    - a. A declaration that employment was terminated unfairly;
    - b. Notice pay ksh.35,221.15;
    - c. Compensation Ksh.35,221.15;
    - d. Underpayments Ksh.80,501.64;
    - e. A certificate of service to issue;And
    - f. Counterclaim is dismissed;



g. Each party bears its costs

**DELIVERED IN OPEN COURT AT MOMBASA THIS 26 DAY OF SEPTEMBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

