



**Tornado Carriers Limited v Okwomi (Employment and Labour Relations Appeal E001 of 2024) [2024] KEELRC 2298 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2298 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E001 OF 2024**

**M MBARŪ, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**TORNADO CARRIERS LIMITED ..... APPELLANT**

**AND**

**WYCLIFFE MACHENGO OKWOMI ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. Noelyne Akee delivered on 6 December 2023 in Mombasa CMELRC No. E668 of 2021)*

**JUDGMENT**

1. The appeal arises from the judgment in Mombasa CMELRC E668 of 2021 delivered on 6 December 2023. The appellant is seeking the judgment to be set aside with costs.
2. The background to the appeal is a claim filed by the respondent on the basis that he was employed by the appellant as a mechanic on 7 January 2015 at a monthly wage of Ksh.20, 000. He worked until the appellant terminated his employment by summary dismissal on 20 June 2021. He claimed that, on 20 June 2021 while at work, Michael Obita was painting some metal rods, there was a can of paint behind and the respondent accidentally hit the gas cylinder which rolled and spilt the paint. He was accused of intentionally spilling the paint and the matter was reported to the appellant. Obita beat him up. The manager summoned all employees who threatened the respondent when he realized he was unsafe. He reported the matter to the police. The manager sent him on an unpaid leave of 10 days and also deducted Ksh.4, 000 from his wages. Upon resuming duty, the respondent was sent away for 10 more days only to be told that there was low work. He had no prior notice, or hearing of payment of terminal dues and claimed the following dues;
  - a. Notice pay Ksh.23,039.45;
  - b. Salary arrears Ksh.23,039.45;



- c. Underpayments for 78 months Ksh.237,077.10;
  - d. Leave pay for 6 years Ksh.111,653.64;
  - e. Prorate leave for 6 months Ksh.9,304.47;
  - f. Service pay for 6 years Ksh.79,752.60;
  - g. House allowance for 78 months Ksh.269,561.75;
  - h. Overtime for 78 months Ksh.898,566.24;
  - i. 12 months compensation Ksh.276,473.40;
  - j. Costs of the suit.
3. In response, the appellant's case was that the respondent was employed as an assistant in the workshop. In June 2021 he had a quarrel with a fellow employee and started a fight and despite calling in security he refused to calm down and became aggressive. The supervisor, John Omenda was forced to call in the police who forcefully removed him from the workshop. The appellant suspended the respondent for 10 days after causing chaos in the workshop. There was no termination of employment save, the respondent failed to attend work after the suspension and continued to abscond duty and the claims made should be dismissed with costs.
4. In the judgment, the learned magistrate concluded that there was an unfair termination of employment through summary dismissal contrary to Sections 41, 44 and 45 of the Employment Act. That the respondent was entitled to the following awards;
- a. Notice pay Ksh.23,039.45;
  - b. House allowances Ksh.269,561;
  - c. 12 months compensation Ksh.276,473;
  - d. Costs of the suit.
5. Aggrieved, the appellant filed this appeal on five (5) grounds;
1. The learned magistrate erred in law and fact in finding that the respondent had discharged the burden of proving that he was summarily dismissed yet he absconded from work.
  2. The learned magistrate erred in law by making a finding based on the assumption that since there was no termination notice, the respondent's suspension amounted to termination.
  3. The learned magistrate erred in law and fact in making a finding without any proper regard to the evidence and submissions by the appellant thereby resulting in wrong conclusions.
  4. The learned magistrate erred in law by awarding the respondent one (1) month's salary in lieu of notice when the respondent had chosen to abscond from work upon being suspended for misconduct.
  5. The learned magistrate erred and misdirected herself in law by awarding compensatory damages of Ksh.276, 473 despite making a finding that the respondent was the direct cause of his alleged termination.
6. The parties attended and agreed to address the appeal by way of written submissions.



7. The appellant submitted that the trial court erred and had no basis or evidence to determine that there was an unfair termination of employment by summary dismissal. The respondent had been issued with several warnings before his suspension. This misconduct was not put into account as required under Section 44 of the *Employment Act*. In the case of *Rudolf Shitandi Daraja v Zablon Juma Atulo t/a Z.J. Atuto & Company Advocates* [2016] eKLR the court held that the employee had failed to discharge the burden of proof that there was unfair termination of employment. The findings that the appellant had a duty to recall the respondent back to work after his suspension was in error. Absconding duty is a matter subject to summary dismissal.
8. The appellant submitted that the awards by the trial court were excessive and without reason. Having absconded duty, the appellant had no reason to pay in lieu of notice. The house allowance awarded failed to take into account that there was no contract of employment giving such a benefit. In the case of *Martin Ireri Ndwiga v Olerai Management Company* [2017] eKLR the court held that upon the statutory deductions, this addresses the due house allowance.
9. The compensation awarded was not justified and no reasons for the maximum award were given. The appeal should be allowed with costs.
10. The respondent submitted that there was an unfair termination of employment. The *Employment Act* has reserved the concept of burden of proof as encapsulated in Section 107 of the *Evidence Act* to adopt the reserve burden of proof. In employment matters, the onus lies with both the employee to prove that there was an unfair termination of employment and the employer to prove that the employee's services were procedurally terminated. In *Kenya Revenue Authority v Reuwell Waithaka Gitahi & 2 Others* (2019) eKLR, the court held that the standard of proof is on the balance of probability not beyond a reasonable doubt, and all the employer is required to prove the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. That is a partly subjective test.
11. In this case, the Respondent was unfairly terminated without any notice of termination after the paint he was using to paint metal rods mistakenly and inadvertently spilt. It was his evidence that after the incident, the Appellant herein proceeded to be sent on an unpaid leave of 10 days. That upon the lapse of the 10 days, it was the Respondent's evidence that he was suspended for a further 10 days.
12. The Appellant testified through its witnesses that after the paint spill incident, the Respondent was suspended for 20 days and that after that they tried recalling him but they were informed that he had developed mental illness. It was further their evidence that the Respondent herein absconded duty leading to summary dismissal.
13. This is contrary to the provisions of Sections 41 and 43 of the *Employment Act*. The employee must be called to a hearing and issued with notice giving reasons leading to summary dismissal. The allegations that the respondent absconded duty is without evidence. In *Simon Mbithi Mbane v Inter Security Services Ltd* [2018] eKLR the court held that An allegation that an employee has absconded duty calls upon an employer to reasonably demonstrate that efforts were made to contact such an employee without success. In the case of *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR, the court held that Dismissal on account of absconding must be preceded by evidence showing that a reasonable attempt was made to contact the employer concerned and that a show cause letter was issued to such employee calling upon such employee to show cause why his services should not be terminated on account of absconding duties.
14. There is no evidence that the appellant followed the due process and the appeal should be dismissed with costs.



## Determination

15. This is a first appeal. The court must re-evaluate, re-assess the record and judgment and make its conclusions. This should be done upon taking note that the trial court had the opportunity to hear the parties in evidence.
16. The appellant has faulted the trial court on the findings that there was summary dismissal despite the fact of the absconding duty.
17. Indeed, under the provisions of Section 44(4) (a) of the *Employment Act*, the employer is allowed to terminate employment where the employee is absent from work without permission or justification. However, the employee is protected under the provisions of Section 41(2) of the *Employment Act*;
  - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.
18. Whatever misconduct or gross misconduct, the employer has a legal duty to invite the employee to attend the hearing and to allow the employee to make his representations in the presence of another employee of his choice.
19. The case by the appellant is that the respondent absconded duty after his suspension. On these assertions, the appellant did not demonstrate what efforts were put in place to trace the respondent to allow him to attend any disciplinary hearing.
20. Section 18(5)(b) of the *Employment Act* requires the employer whose employee has deserted or absconded duty to issue notice terminating employment and where the employee cannot be traced, notice is served upon the Labour Officer;
  - (5) Upon the termination of a contract of service—
    - (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.
21. Therefore, an employer cannot justify termination of employment by simply saying that the employee absconded duty. The legal duty is upon the employer to issue notice inviting the employee to attend a disciplinary hearing and where the employee fails to attend, notice be served upon the labour officer. There is nothing to demonstrate that the appellant took into account the provisions of Sections 41 and 44 of the *Employment Act*.
22. The findings by the trial court that there was unfair termination of employment cannot be faulted.
23. Notice pay is due as awarded.
24. On the award of compensation, indeed, the appellant is correct in the submissions that the award of maximum compensation at 12 months should be justified and reasons given. In the case of *Albert Nyabuto Nyauntu v Kenya Accountants and Secretaries National Examination Board (KASNEB) [2020] eKLR* the court held that Section 49 of the *Employment Act* only allows a maximum award of



12 months. To allocate the maximum, the court must give reasons and the exceptional circumstances that justify such an award.

25. In the case of *Gharal v Mageni (Appeal 191 of 2022)* [2023] KEELRC and in the case of Kenya Union of Commercial, Food & Allied Workers v Emuki Sacco Society Limited [2020] eKLR, the court held that 12 months award in compensation should only issue in exceptional cases. The court should set out the reasons that justify the maximum award.
26. In this case, the respondent had worked for 6 years, he had a poor work record and under Section 45(5) of the *Employment Act*, these matters put into account, an award of 6 months' compensation is hereby found appropriate. On a wage of Ksh.20, 000 per month, the sum of Ksh.120, 000.
27. The appellant was on a gross wage of Ksh.20, 000 per month. His employment was workshop assistant and the wage paid was above the minimum wage due. Notice pay is awarded at Ksh.20, 000.
28. The appellant has challenged the awards made by the learned magistrate. On the award of House allowances Ksh.269, 561 the respondent claimed that for the 78 months, he was entitled to a 15% house allowance.
29. In employment and labour relations, the employer has the legal duty to submit work records in terms of Section 10(6) and (7) of the *Employment Act*. The appellant has not filed any work records to demonstrate how the house allowance was allocated. As a workshop assistant, the respondent was paid a wage of Ksh.20, 000 over the years. This wage was generous save there is no desegregation of the house allowance for the 78 months. On the basic wage of Ksh.20, 000 each month, the house allowance due is Ksh.3, 000 x 78 months total due is Ksh.234, 000.
30. Accordingly, on the above analysis, the judgment in Mombasa CMELRC E668 of 2021 is reviewed in the following terms;
  - a. Compensation Ksh.120,000;
  - b. Notice pay Ksh.20,000;
  - c. House allowance Ksh.234,000;
  - d. For the appeal, each party bears its costs;
  - e. For the trial court, costs as awarded.

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

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

