



**The Dhow House Limited v Gisebe (Appeal E081 of 2023)  
[2024] KEELRC 2332 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2332 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E081 OF 2023  
M MBARÚ, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**THE DHOW HOUSE LIMITED ..... APPELLANT**

**AND**

**CLINTON DAVID GISEBE ..... RESPONDENT**

*(Being an appeal from the judgment of D.O. Mbeja delivered  
on 27 July 2023 in Mombasa CMELRC No.E330 of 2021)*

**JUDGMENT**

1. The appeal arises from the judgment delivered on 27 July 2023 in Mombasa CM ELRC No.E330 of 2021. The appellant is seeking the judgment be set aside or varied and in the alternative, the court to reassess the evidence and issue judgment thereon.
2. The background to this appeal is a claim filed by the respondent on the basis that on 21<sup>st</sup> March 2019, he was employed by the appellant as a bartender earning ksh. 18,000 per month. On 17 March 2021, he reported to work but the manager, Marko summoned him and in the office found Mrs. Michelle who terminated his employment because there was no work at the restaurant. The company had decided to reduce the number of employees and he was the first to be affected. The respondent claimed that he was declared redundant yet the appellant hired other employees to take over his duties which was discriminatory and unfair. He claimed that there was no notice or valid reasons leading to termination of employment and claimed the following;
  - a. Notice pay ksh.18,000;
  - b. 3 years accrued leave Ksh.43,614.90;
  - c. 3 years severance pay ksh.31,153.50;
  - d. 3 years' service pay ksh.31,153.50;



- e. House allowance for 15 months Ksh.70,000;
  - f. Work during public holidays Ksh.20,769;
  - g. 12 months compensation Ksh.216,000;
  - h. Costs of the suit.
3. In response, the appellant admitted that the respondent was employed on 23 March 2019 at a monthly wage of Ksh.16, 500 which was later increased to 18,000 and later to Ksh.21, 000 in November 2019 and then reduced to Ksh.18, 000 at the time of his employment terminated. In a letter dated 5 August 2020, the respondent voluntarily asked to resign from his employment and to be paid his terminal dues, he also asked to be re-employed whenever the respondent would have an opportunity. The resignation was accepted and he was discharged and paid terminal dues. The claims made relating to the alleged unfair termination of discriminatory treatment are without merit.
  4. The response is also that an opportunity for a barman arose and the appellant contacted the respondent as he had requested. It was agreed that he be re-engaged on 29 August 2020 at a wage of ksh.15, 000 but due to the Covid pandemic, business was affected due to government restrictions on the sale of alcohol and restrictions in movements. The business did not improve and this was communicated to all employees who agreed to have their wages reduced and others willingly left their employment. On 16 March 2021, the respondent was off duty and when he reported back to work on 17 March 2021 he was asked to meet the manager Mr. Marko and assistant manager Michelle Castaneda to discuss the issue. Upon being informed about the decision to reduce his wage, the respondent declined and instead requested to leave employment and be paid his terminal due which was done. There was no redundancy or discriminatory treatment as alleged.
  5. The learned magistrate heard the parties and in the judgment held that there was wrongful termination of employment and the claims made were justified.
  6. Aggrieved, the appellant filed this appeal on three (3) grounds;
    1. The learned magistrate judgment is contrary to the matters raised in the appellant's response to the claim, evidence and submissions both in law and fact;
      - a. It fails to make any or any proper findings based on the response to the claim, the appellant's submissions, statements and the appellant's witnesses;
      - b. It is contrary to the weight of and inconsistent with the evidence adduced by the appellant which evidence was uncontroverted;
      - c. It fails to consider properly the written submissions made by the appellant.
    2. The learned magistrate erred in law and fact in allowing the respondent's claim by failing to appreciate that on the strength of the respondent's Memorandum of Claim, the evidence adduced, the submissions presented and the law, the respondent's claim was not merited thus he was not entitled to the reliefs sought;
    3. The learned magistrate erred in law and fact in making an award of damages in favour of the respondent notwithstanding that the claim had not been proved. Making an award was unreasonable, unjustifiable and erroneous.
  7. On the appeal, both parties agreed to address by way of written submissions.



8. The appellant submitted that under the provisions of Section 107(1) of the *Evidence Act* and Section 47(5) of the *Employment Act*, the employee has the burden to prove there was unfair termination of employment as held in the case of *David Gitinji Kibuge v New Kenya Co-operative Creameries Ltd* (KCC) [2019 eKLR. The failure by the respondent to demonstrate how his employment was terminated unfairly, the appellant had no duty to justify the termination of employment under sections 43 and 45 of the *Employment Act*. He had no prima facie case necessitating the shift in the burden of proof.
9. The respondent abandoned his employment at will through resignation and cannot turn back and claim that he was unfairly dismissed or declared redundant. In the case of *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2022] eKLR the court held that when the employee abandons his employment, such an act of desertion justifies summary dismissal.
10. The learned magistrate erred in the findings that the claims made were justified and made a general award without any analysis of the evidence, the pleadings or the written submissions.
11. The appellant submitted that upon his resignation, the respondent was paid his terminal dues of Ksh.17, 500 on 17 May 2021. These included payments for public holidays accumulated from 4 June 2019 to 31<sup>st</sup> May 2020.
12. The claims arising from the first employment from 21<sup>st</sup> March 2019 to 5 August 2020 when the respondent resigned are not justified. Terminal dues had been paid in full. The respondent had a loan facility of Ksh. 10,000 and hence was only entitled to Ksh.9, 000 in wages.
13. The appellant submitted that during the Covid pandemic, the majority of businesses were forced to close or employers were forced to employ extraordinary measures to remain in business. The appellant offered the respondent a wage reduction which he declined. There was no redundancy as alleged and the award in severance pay is not justified. The appeal should be allowed with costs.
14. The respondent submitted that he was employed on 21<sup>st</sup> March 2019 earning Ksh.18, 000 per month. His employment was terminated on 17 March 2021 following a redundancy but his terminal dues were not paid in full. He did not abscond duty as alleged. Had such a matter occurred, under Section 44(4) of the *Employment Act*, summary dismissal should have been issued. In the case of *Richard Kiplimo Koech v Yuko Supermarket Ltd* [2015] eKLR the court held that absconding duty is subject to summary dismissal but the employee's rights under Section 41 of the *Employment Act* should be protected and a hearing conducted before termination of employment. In the case of *Kenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited* [2020] eKLR the court held that the COVID-19 pandemic and its effects do not serve as an Act of God amounting to frustration of the contract.
15. The respondent submitted that his employment was unfairly terminated contrary to Section 43 of the *Employment Act* as held in the case of *Janet Nyandiko v Kenya Commercial Bank Limited*[2017] eKLR. The claim for notice pay is justified as held in *Simon Mbithi Mbane v Inter Security Services Limited* [2018] eKLR. The claim for leave, house allowance and work during public holidays is justified. The award of service pay is due since the appellant did not remit NSSF payments for all the years worked. There is a redundancy, the award of severance pay is due as awarded by the trial court.

### **Determination**

16. This being a first appeal, this court is under a duty as stipulated in section 78 of the *Civil Procedure Act*, to re-evaluate and re-assess the evidence and make its conclusions. It must, however, be kept in mind that the trial court, unlike the appellate court, had the advantage of observing the demeanour of



- the witnesses and hearing their evidence first-hand. In the case of *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court held that;
17. This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.
  18. In this case, it is not in dispute that although the respondent was employed by the appellant as a bartender, this was in two phases. The first phase was from 23 March 2019 to 5 August 2020 when the respondent resigned. He was re-employed on 29 August 2020 and on 17 March 2021 he was requested to have his wage reduced due to Covid pandemic effects but declined leading to termination of employment.
  19. The respondent has not denied the details of these two phases of his employment by the appellant.
  20. The respondent filed the Memorandum of Claim on 18 May 2021 seeking various relief for the total period of service in the two phases of his employment with the appellant.
  21. Under the provisions of Section 90 of the Act, the respondent had 3 years to claim his employment terminal dues under the provisions of Section 35(4) of the *Employment Act*;
    - (4) Nothing in this section affects the right—
      - (a) of an employee whose services have been terminated to dispute the lawfulness or fairness of the termination in accordance with the provisions of section 46; or
      - (b) of an employer or an employee to terminate a contract of employment without notice for any cause recognised by law.
  22. Whatever terminal dues were owed at the end of each phase of employment, the lawfulness or fairness must be gone into and addressed on the merits.
  23. The appellant filed various work records to support its case.
  24. The general awards by the trial court should have put the two phases of employment in context and analyzed each with specific awards taking into account the work records.
  25. The appellant has admitted in response that on 17 March 2021, they called the respondent and discussed a reduction of his wage due to the effects of the pandemic and the need to remain in business but he declined. Indeed, under the provisions of Section 10(5) of the *Employment Act*, an employee cannot suffer a fundamental change to his employment contract without his written approval or consent. To use such refusal to terminate employment is unlawful and unfair.
  26. Section 10(5) of the *Employment Act* requires that;
    - (5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.
  27. In the case of *Margaret Wanja Muthui v Ministry of Transport, Infrastructure Housing, Urban Development and Public Works & 2 others* [2022] eKLR the court held that a change in employment terms must be communicated in writing. Where employment is regulated under a written contract or letter of appointment, any change thereof must be in writing. It cannot be inferred or assumed.



28. In this case, the appellant has no record of any consent obtained from the respondent to reduce his wage and the reasons leading to termination of employment on 17 March 2021. There was an unfair termination of employment and no reasons are given to justify such action.
29. The trial court analyzed the evidence and though for different reasons, the findings that there was unfair termination of employment cannot be faulted.
30. The respondent was entitled to the award of notice pay and compensation.
31. In the last phase of employment, the respondent had a gross monthly wage of Ksh.17, 000 which is due in notice pay.
32. At the end of employment, the claimant had a loan facility of Ksh.10, 000 which should be deducted from his terminal dues under Sections 17, 18 and 19 of the Employment Act.  
The total due in notice pay is Ksh.7, 000.
33. In assessing the compensation due, the trial court made a general award as claimed. The reasons and justification for the maximum awards are not outlined. This is an error and the jurisprudence of the court and the Court of Appeal is that the maximum available compensation of 12 months should be awarded only in exceptional cases and for stated reasons. Maximum compensation must be given a justification.
34. In the case of Kenya Broadcasting Corporation v Geoffrey Wakio [2019] eKLR the Court of Appeal held that;  
  
This Court has established the rule that an award of a maximum of 12 months' pay must be based on sound judicial principles. In Ol Pejeta Ranching Limited v. David Wanjau Muhoro [2017] eKLR this Court categorically stated that the trial Judge must justify or explain why a claimant is entitled to the maximum award; and that the exercise of discretion must not be capricious or whimsical.
35. This position is reiterated in the case of Kenya Airways Ltd v. Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR that the discretion to award a maximum compensation of 12 months' pay must be judicially exercised.
36. In this case, there were no reasons given and this court is justified to interfere with the discretion of the trial court in awarding the maximum compensation of 12 months. The appellant had worked for 6 months in his last phase of employment. The appellants called him to discuss the prevailing economic situation and the reasons required to keep him on the job by reduction of his wage. There was an effort to make a good case although the legal threshold was not met.  
Compensation of one (1) gross wage is hereby found justified all at Ksh.17, 000.
37. Whatever reasons led to the termination of employment, the claims made should have been addressed and assessed on the merits.
38. On the claim for accrued leave days for 3 years, the two phases of employment taken into account, Section 28(4) of the Employment Act only allows an employee to accumulate leave days for 18 months.
39. On 17 March 2020, the respondent took his annual leave and was also allowed that;  
  
Due to the ongoing coronavirus epidemic, and the slowdown of business, the management wants to inform you that you will be paid in full your March 2020 salary of wages, reporting back will be subject to, how the disease will have been handled by the government.



Note that from April you will be on unpaid leave until your recall. ...

The due annual leave up to the year 2020 was addressed.

40. For the 6 months in the second phase of employment, the respondent is only entitled to 11 days of annual leave per Section 28 of the Employment Act. On the basic wage of Ksh.17, 000 total due prorated leave is Ksh.8, 500.
41. On the claim for severance pay, this is due in a redundancy. There was no redundancy declared per se. The issue was reduction of wage to allow the respondent to remain afloat due to the impact of the pandemic. The unfair circumstances leading to loss of employment are addressed and redressed with compensation.
42. Even in a case where the circumstances related to redundancy, which is not the case here, the respondent only worked for 6 months under his last phase of employment. His first employment terminated upon resignation on 5 August 2020. His last employment by the appellant commenced and ended on 29 August 2020 and 17 March 2021 respectively.  
Tabulation of severance pay is not prorated.  
The claim for severance pay for 3 years is not justified.
43. On the claim for service pay for 3 years, the appellant as the employer submitted the NSSF statement. This is a sufficient record in compliance with Section 35(5) and (6) of the Employment Act. The claim for service pay is not justified.
44. On the claim for house allowance, the respondent was employed as a bartender. There is no written contract of employment submitted by either party. Save for notices for salary increments, there is no letter with an outline of the terms and conditions of employment.
45. Under the Regulation of Wage Orders, the respondent can only be classified under the General Wage Orders. The basic wage due by August 2020 was ksh.13, 572.90. The provisions of house allowance at 15% is Ksh.2, 035.80 total gross wage is Ksh.15, 607.80 per month.
46. The respondent was paid a wage of Ksh.17, 000 which is above the due minimum wage.
47. In the first phase of employment, he had a gross wage of Ksh.18, 000 which was above the minimum wage.
48. On the claim for work during public holidays, on 11 September 2020, the appellant paid the respondent a severance package of Ksh.17, 500. The details of such severance pay upon his resignation are not gone into.  
Work during public holidays is regulated by the Minister.
49. The respondent did an outline of all public holidays worked from the year 2019 until 31<sup>st</sup> July 2020. There is no record filed by the appellant that the respondent was compensated for working during the noted public holidays.  
The claim and ward of Ksh.20, 769 is with merit and justified.
50. On costs, the findings that there was unfair termination and that the appeal is partial with merit, each party to bear its costs and for the proceedings before the trial court, costs as awarded.
51. Accordingly, the appeal is partially with merit and the judgment in Mombasa CM ELRC No.E330 of 2021 is hereby reviewed in the following terms;



- a. Notice pay Ksh.7,000 (less the loan amount);
- b. Compensation Ksh.17,000;
- c. Work on public holidays ksh.20,769;
- d. For the appeal, each party to bear its costs;
- e. For the lower court proceedings, 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 .....

