



**Juma v Cello Thermowave Limited (Appeal E067 of 2023)
[2024] KEELRC 2708 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2708 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E067 OF 2023
M MBARŪ, J
OCTOBER 31, 2024**

BETWEEN

OMAR OSMAN JUMA APPELLANT

AND

CELLO THERMOWAVE LIMITED RESPONDENT

*(Being an appeal from the judgment of Hon. Nabibya delivered
on 22 June 2023 in Mombasa MCELRC E227 of 2021)*

JUDGMENT

1. The appeal arises from the judgment delivered on 22 June 2023 in Mombasa MCELRC No. E227 of 2021. The appellant is seeking that the trial court's judgment be set aside and the claim be tabulated as set out in the Memorandum of Claim and allowed with costs.
2. The background to the appeal is a claim filed by the appellant on the basis that on 17 October 1991, the appellant was employed by the respondent as a mechanic and then trading as Doshi Ironmongers Limited (Doshi). On 15 April 2010 following the reorganization of Doshi, his employment was transferred to the respondent as part of the group of companies of Doshi. The wage paid was Ksh.38,300 per month. He worked until 10 March 2021 when his employment was unfairly terminated. In the year 2017 to 2020, the appellant was issued with warning letters on allegations that he was found sleeping at work and he noted that he was 65 years old and would take naps which was natural especially when he was idle waiting for the respondent to deliver materials for his continued work. The respondent continued to issue the warning letters and some were postdated to 21 October 2021 to paint the appellant as an employee who sleeps at work.
3. On 3 March 2021, the appellant was issued a show cause notice dated 27 February 2021 and he responded on 3 March 2021 and explained that he was unwell and submitted evidence of sickness. On 10 March 2021 the appellant reported at work but his manager, Amit Doshi summoned him for



a disciplinary meeting where he was directed to submit all company property and vacate the premises without being given the opportunity to defend himself. He was not paid any terminal dues. During his employment, the appellant was not allowed to take annual leave, no house allowance was paid or statutory deductions. He claimed the following;

- a. One month notice pay ksh.38,200;
- b. House allowance for 360 months at 15% Ksh.2,068,200;
- c. Unpaid leave days for 30 years Ksh.1,149,300;
- d. Payment for public holidays for 30 years ksh.459,720;
- e. 12 months compensation Ksh.459,600;
- f. Unpaid overtime 121 x 1 hour x 15 days per month for 30 years Ksh.653,400;
- g. Unpaid NSSF and NHIF for 360 months Ksh.180,000;
- h. Service pay for 30 years Ksh.574,500;
- i. Certificate of service;
- j. Costs of the suit.

4. In response, the respondent denied the claim that there was an unfair termination of employment. The appellant was issued with warnings for sleeping while on duty and he admitted to these facts. A notice to show cause was issued through a letter dated 27 February 2021 and his written response did not provide evidence of sickness and the claims made were denied.

The appellant took his annual leave numerous times;

By 31st December 2020 he had taken leave for 33.75 days;

By 31st December 2019 he had taken leave for 33.73 days;

By 31st December 2018 he had taken leave for 26 days;

By 31st December 2017 he had taken leave for 35 days;

By 31st December 2016, he had taken leave for 33 days.

- 5 The appellant was paid his house allowance and there were remittances to NSSF and NHIF until March 2021 when he was summarily dismissed. The appellant had many warning letters and a disciplinary hearing was conducted before termination of employment on 9 March 2021. The provisions of Section 44 of the [Employment Act](#) were followed with several warnings;

- a. The respondent sent a warning letter on 17 August 2017 when the appellant was caught sleeping in the staff bus while on duty and he accepted the notice.
- b. On 25 April 2018 the appellant was issued with a notice to show cause which he refused to receive by signing a copy of the same.
- c. On 25 April 2018 the appellant was issued with a warning notice for sleeping in a staff member's vehicle while he was on duty which notice he acknowledged.
- d. On 21 October 2020 the appellant was issued with a warning when he was found sleeping while on duty resulting in pending repairs to the staff bus.



- e. He was also warned for the use of abusive language to his seniors and subordinates;
 - f. On 27 February 2021 the appellant was issued with a notice to show cause for sleeping while at work.
 - g. On 3 March 2021 the appellant was issued with a show cause notice following various complaints against him. He cited ill health and apologized.
6. The medical form from Ganjoni Hospital Mombasa did not give a sufficient explanation for the appellant's conduct. The form dated 4 March 2021 related to a show cause dated 27 February 2021 a day before the instance and the authenticating stamp is dated 3 March 2021 a day before the appellant saw the doctor. The sleeping incident took place on 25 February 2021 yet the medical form only permitted the appellant to be absent on 4 and 5 March 2021 and hence the conduct on 25 February 2021 was not justified. The discrepancies taken into account demonstrated that the appellant had failed to show good cause. A disciplinary hearing was held and the appellant had his representative and though notice dated 9 March 2021 there was summary dismissal. The certificate of service is ready for collection and upon clearance, payment of terminal dues for days worked. Through cheque No. 3910 the respondent remitted the terminal dues through the labour office, Mombasa. Termination of employment was lawful and justified and the claims be dismissed.

The trial magistrate heard the parties and dismissed the suit.

7. Aggrieved, the appellant filed this appeal on grounds that the trial magistrate erred in finding that the appellant had failed to provide a contract of employment after attaining 60 years yet this was not an issue for determination and employment was not denied. By intimating that the appellant was a casual employee after attaining 60 years and hence employment ought to be terminated by a day's notice was an error.
8. Other grounds of appeal are that the finding that the summary dismissal was justified was by error since no disciplinary hearing was conducted. The appellant deserved a fair hearing despite attaining 60 years and above. The finding that retirement was 60 years is without legal basis and the fact that the appellant worked for 7 more years after attaining 60 years. The failure to assess the terminal dues was in error particularly the summary dismissal without fair procedures and the appeal should be allowed.
9. Both parties attended and agreed to address the appeal by way of written submissions.
10. The appellant submitted that he worked for the respondent for 30 years but on 10 March 2021 he was called to a meeting and informed that a disciplinary meeting would be held and he should attend with a witness of his choice. He was not prepared for the meeting and there was no notice. He did not understand the language of the meeting, English.
11. The appellant submitted that the respondent had the burden of proof that there were justified grounds leading to termination of employment which was not discharged. There was no contract with a determinable retirement age. In the case of *Robert Githua Githaka v Saab Kenya Limited* [2016] eKLR the court held that where the retirement age is not agreed in the contract, an employee can work beyond the age of 55 to 57 years. In this case, termination of employment was unfair.
12. The respondent's witness Amit Joshi admitted that the appellant was not formerly invited to a disciplinary hearing and hence was not prepared with any witness to make his representations. This resulted in unfair termination of employment as held in *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR; and *Muthaiga Country Club v KUDHEIHA Workers* [2017] eKLR.



13. In this case, notice pay is due following unfair termination of employment without due process. Under Section 31 of the *Employment Act*, no housing was provided or payment of an allowance was made, and this is due for 30 years. The appellant worked during public holidays without pay, and he should be compensated for such time. There is no evidence of statutory remittances, and service pay should be awarded for years served.

There are no written submissions filed by the respondent.

Determination

14. On the grounds of appeal and submissions made, the substance of it shall be assessed noting this is a first appeal and on the principle that the court ought to examine and re-evaluate the evidence on record, assess it and make its conclusion. See *Selle & Another versus Associated Motor Boat Co. Ltd. & others* (1968) EA 123.

Through notice dated 9 March 2021, the respondent terminated the appellant's employment by summary dismissal. The basis was that he had admitted to being found sleeping during working hours. The appellant admitted that he had been issued with warning letters over the same conduct. He filed these warning letters with his list of documents to support his claims.

Under paragraph 2.6 of the Memorandum of Claim, the appellant's case was that;

The claimant avers that he informed the respondent that he was a sixty five year old man and that sometimes napping was natural, especially in instances where they were idle and waiting for the respondent to deliver materials to enable them continue with work.

This conduct of sleeping while at work had been brought to the attention of the appellant through several warning letters.

Warning letter dated 25 April 2018;

Warning letter of 17 August 2017;

Warning letter of 21 October 2020.

Ultimately, through a notice to show cause dated 27 February 2021, the appellant was directed to the respondent within 7 days.

The respondent filed the record of the disciplinary meeting held on 8 March 2021 where the appellant attended in the presence of his representative of choice, Omar Osman Juma.

15. The employer is allowed to terminate employment through summary dismissal for gross misconduct. Whatever explanation the appellant had for sleeping at work, the fact of the matter is that he had received several warnings and he persisted in the same conduct. He was invited to show cause why disciplinary action should not be taken against him. There was a disciplinary meeting held in the presence of a person of his choice and his explanation was found unsatisfactory. The Respondent had every reason to consider the appellant as having engaged in acts of gross misconduct as contemplated under section 44 of the *Employment Act*.
16. All that section 44(4) of the *Employment Act* requires for an employer to terminate an employee is that he has reasonable and sufficient grounds to suspect that the employee has been involved in gross misconduct which is injurious to the person or property of the employer. Sleeping while on duty is conduct that the appellant had been warned about. He repeated the same conduct leading to termination of employment.



17. I therefore find that the Respondent had valid reasons to terminate the Appellant in his employment. There was sufficient evidence to point at conduct bordering on gross misconduct on the part of the appellant.
18. The trial court only made a general finding that the appellant was over 60 years old and hence continued employment was on a casual basis terminable by one day's notice. This is in error.
19. Indeed, as the appellant submitted, retirement age is agreed upon by parties, under a collective agreement, or by the employer's policy. In this case, the respondent did not submit any policy on regulating the retirement age.
20. The appellant continued in the respondent's service for many years until he reached age 65. His rights at work cannot be negated due to age. Denying the appellant any rights at work based on age borders on discriminatory treatment. He had rights, benefits, and the protection of the law for the entire period of employment.
21. The trial court should have analyzed all the claims made on the merits.
22. Notice pay and compensation are not due on the finding that summary dismissal was justified and lawful.
23. On the claim for accrued leave days for 30 years, the respondent as the custodian of work records filed leave forms and schedule of leave days taken by the appellant over the years.
 - By 31st December 2020, the appellant had taken leave for 33.75 days;
 - By 31st December 2019, the appellant had taken leave for 33.73 days;
 - By 31st December 2018, the appellant had taken leave for 26 days;
 - By 31st December 2017, the appellant had taken leave for 35 days;
 - By 31st December 2016, the appellant had taken leave for 33 days.
24. From December to 9 March 2021, for the 2 full months, under the provisions of Section 28 of the [Employment Act](#), the appellant had accrued $1.75 \times 2 = 3.5$ leave days. On the basic wage of Ksh.33, 304 the amount due in leave pay is Ksh. 3,886.
25. For the period of 2016 backwards, under the provisions of Section 28(4) of the [Employment Act](#), any accrued leave days are lost by operation of the law. See *Matseho v Newton* [2022] eKLR and *Charles Nyaringo Rianga v Hatari Security Guards Limited* [2019] eKLR.
26. On the claim for payment for public holidays, these are special days gazette by the Minister. A claimant must plead with particulars. A general claim for 30 years cannot suffice.
27. The claims for overtime of one hour each day for 30 years are not given a basis. During employment, there is evidence that the appellant went on annual leave as set out above. To apply a general tabulation of one hour each day for the entire period of employment is an exaggeration.
28. On the claim for house allowance, the respondent filed the payment statement for the appellant. The basic wage paid was Ksh.33, 304 plus a house allowance of Ksh.4, 996. This evidence is not challenged in any material way.
29. Under the Wage Orders, a mechanic working in Mombasa in the year 2021 on a gross wage of Ksh.38, 200 was well compensated for his labour. The appellant has not produced any certification for a higher qualification to claim outside the Wage Orders.



30. The payment statement submitted demonstrates statutory deductions and remittances. Hence, the appellant was removed from the provisions of Section 35(5) and (6) of the [Employment Act](#). The claim to be paid for the NSSF and NHIF dues and service pay is unjustified.
31. The respondent tabulated the terminal dues owed to the appellant at Ksh.6, 846 for;
 - a. Days worked in March 2021 and
 - b. Leave days
32. On the wage for 9 days worked in March 2021, the sum of Ksh.11,460 plus leave pay of Ksh.3,886 and the total due is Ksh.15,346.

The total sum due is Ksh.15, 346 less statutory deductions.
33. The appellant shall attend for clearance and payment of Ksh.15, 346 less statutory deductions. A certificate of service is to be issued.
34. The appeal is allowed to this extent. Judgment in Mombasa MCELRC E227 of 2021 is reviewed with an award of Ksh.15, 346 in leave pay and days worked to be paid less statutory deductions. Each party bears its costs.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 31ST DAY OF OCTOBER 2024.

M. MBARŪ

JUDGE

