



**Agil Kenya Limited (Formerly Bollore Transport and Logistics Kenya Limited) v Abdalla  
(Appeal E070 of 2024) [2024] KEELRC 2624 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2624 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
APPEAL E070 OF 2024  
M MBARŪ, J  
OCTOBER 24, 2024**

**BETWEEN**

**AGL KENYA LIMITED (FORMERLY BOLLORE TRANSPORT AND  
LOGISTICS KENYA LIMITED) ..... APPELLANT**

**AND**

**NAJMA SAID ABDALLA ..... RESPONDENT**

*(Being an Appeal and Cross-Appeal from the judgment of Hon. N. R. Akee  
delivered on 25 March 2024 in Mombasa CMELRC No. E566 of 2021)*

**JUDGMENT**

1. The appeal and cross-appeal arises from the judgment delivered on 25 March 2024 in Mombasa CM ELRC No E566 of 2021. The appellant seeks the judgment directing the appellant to pay the respondent leave pay of Kshs 984, 549 be set aside with costs.
2. In the cross-appeal, the respondent is seeking that the judgment be varied with an award of Kshs 3, 544,380 for 30 years of house allowances, Kshs 984, 549.90 for severance pay, and Kshs 787, 632 for 12 months of compensation for unfair termination of employment.
3. The facts of the case are that the appellant employed the respondent as a typist on 2 January 1990, earning Kshs 65, 000 per month. She claimed that there was unfair termination of employment and that on 18 December 2019, the appellant issued notice dated 11 December 2019 to the respondent an invitation to a meeting on 20 December 2019 to discuss Kenya's re-organisation and the extent to which it would affect her role. That there was unfair termination of employment and hence claimed the following;
  - a. Notice pay Kshs 65, 636.66;
  - b. Unpaid house allowance for 30 years Kshs 3, 544,380;



- c. Unpaid leave allowance for 30 years Kshs 984, 549.90;
  - d. Severance pay for 30 years Kshs 984, 600;
  - e. Unexpired contract for 8 years Kshs 6,301,119.40;
  - f. 12 months compensation for unfair termination of employment Kshs 787,632;
  - g. Certificate of service;
  - h. Costs of the suit.
4. In response, the appellant admitted employment, but the respondent agreed to proceed with early retirement upon the offer. All the arrangements were complied with, and terminal dues were paid. The appellant took early retirement after a meeting on 20 December 2019, notice was issued, and terminal dues were paid in full. This was not a case of redundancy as alleged, and the claims made are without merit.
  5. The judgment of the trial court established that there was unfair termination of employment but no wrongful termination of employment since the respondent was issued notice. The court awarded leave pay of Kshs 984, 549 and costs of the suit.
  6. Aggrieved by the judgment, the appellant has seven (7) grounds of appeal on the basis that the trial court erred in awarding leave pay, yet the claimant, being a continuing injury, was time-barred by dint of section 90 of the *Employment Act*. A claim was filed outside 12 months, whereas the respondent retired on 20 January 2020 and filed the claim on 10 September 2021; such claim was out of time. The basis for payment of leave pay was not addressed in the judgment, and the evidence submitted was not considered. The appellant submitted leave schedule forms dated;
    - 26 April 2014,
    - 22 July 2013,
    - 3 June 2011,
    - 10 August 2010,
    - 24 June 2009,
    - 16 June 2007,
    - 21 January 1994, and
    - 6 July 1992.
  7. The last pay slip for the respondent for January 2020 indicated that the leave liability of Kshs 18, 962.43 was paid. The awards of leave pay going back to the year 1990 are contrary to Section 28 of the *Employment Act*. The respondent signed the discharge voucher on 29 January 2020, conceding that she had been paid final dues in full and was estopped from claims made.
  8. In cross-appeal, the respondent's case is that the award of leave pay is justified and by section 28 of the *Employment Act*. However, the claims made were dismissed without basis and outside the law. The trial court erred in finding sufficient grounds for termination of employment and failed to appreciate that the employment contract did not provide for early retirement. Such retirement amounts to changing the employment terms with the respondent's consent. The findings that house allowances accrue at the end of every month and non-payment was a continuing injury were in error. The trial court



- failed to appreciate the evidence and concluded that the circumstances leading to the termination of employment could not be unlawful because there was no notice.
9. Both parties attended and agreed to address the appeal through written submissions.
  10. The appellant submitted that the leave and house allowances claims were time-barred by dint of section 90 of the *Employment Act*. In the case of *John Kiiru Njiiri v University of Nairobi* Cause No 696 of 2019, the court held that Section 90 of the *Employment Act* provides that in a case of continuing injury or damage, such must be addressed within 12 months from the date of cessation. In the case of *G4S Security Services (K) Limited v Joseph Kamau & 486 others* [2018] eKLR, the court held that a continuing injury must be addressed within 12 months from the date of cessation.
  11. In this case, the respondent retired on 20 January 2020 and filed the claim on 20 January 2021, 19 months later. The claim for continuing injury in leave pay and house allowances was lost.
  12. The appellant submitted that early retirement was proper and procedural. Through a letter dated 11 December 2019, the appellant invited the respondent to a meeting held on 20 December 2019 and indicated there would be a re-organisation, but her position would not be affected. She was offered early retirement, having attained 50 years and had worked for over 20 years. The respondent was advised on the benefits of early retirement, which included;
    - a. 6 months' notice pay;
    - b. Service pay for 26 days for each year worked;
    - c. Leave days earned and not taken;
    - d. Salary for days worked and
    - e. Pension savings.
  13. The respondent was served with notice of early retirement on 23 December 2019, and she signed an agreement. In a letter dated 17 January 2020, the appellant advised the respondent that her last working day would be 20 January 2020, and she accepted and signed the letter. Upon payment of terminal dues, the respondent signed an acceptance discharge voucher.
  14. The appellant submitted that termination of employment was not based on redundancy, and the claim for severance pay does not accrue. The respondent was fully compensated in an early retirement package with a payment of Kshs 1, 082,276.32, not Kshs 482, 644.90, as alleged. The deductions made were statutory, and the advances were owed to the Sacco. The pension has since been processed and paid in full, and the appeal should be allowed.
  15. In response and cross-appeal, the respondent submitted that she is entitled to compensation for unpaid leave and house allowances since, under Section 31 of the *Employment Act*, she had such benefits, which the appellant did not allocate.
  16. The respondent submitted that redundancy is defined under Section 2 of the *Employment Act* as the involuntary loss of employment due to no fault of the employee. She had no control over re-organising the appellant's business, and the relocation from Mombasa to Nairobi affected her employment. In the case of *Henry Okwach Inzechele v Kenya Kazi Security Ltd* [2017] eKLR court held that reasons leading to termination of employment must be stated. In this case, the re-organisation of business led to redundancy. There was no due process resulting in unfair termination of employment under Sections 43 and 45 of the *Employment Act*. Without a valid reason resulting in unfair termination of employment, the orders sought in the Memorandum of Claim should have been awarded.



17. The respondent submitted that there was a variation of the employment letter leading to unfair termination of employment. Through a notice dated 17 January 2020, the appellant ignored the letter of appointment dated 29 December 1989. Before the notice of early retirement was issued, the appellant called for a meeting on re-organisation. The agenda was then ignored, and an early retirement offer was issued. Such varied employment terms without notice or approval by the respondent. In the case of *Hamida Bana & 102 others v National Bank of Kenya* [2017] eKLR, the court held that when the employees were asked to take early retirement, this was contrary to Section 10 of the *Employment Act* and negated the CBA between the parties. Changes to the employment contract should be with the employee's written consent.
18. In the case of *Kepha Thuo Magua v Board of Governors Satima Secondary School* [2013] eKLR, the court held that the employee had raised genuine concerns over early retirement and was denied a fair chance to address them, which resulted in a violation of the law.
19. In this case, the compensation should be reviewed and awarded with costs and interests.

### Determination

20. A first appellate court must re-evaluate the evidence before the trial court and 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* [1968] EA and *Peters v Sunday Post Limited* [1958] EA.
21. As submitted by the appellant, Section 90 of the *Employment Act* applies in two parts. One part requires that all employment and labour relations claims be addressed within 30 years from the date employment ceased.
22. The other part relates to continuing injuries or damage. In my humble view, such relates to claims within employment that the employee must address within 12 months. However, the Court of Appeal has since offered guidance in the matter in the case of *The German School Society & another v Ohany & another* (Civil Appeal 325 & 342 of 2018 (Consolidated)) [2023] KECA. This decision binds this court. The position taken is that all claims based on a continuing injury within employment must be addressed within the provisions of Section 90 of the *Employment Act* and 12 months from the date of cessation.

The Court of Appeal held that;

Normally, a belated service-related claim will be rejected on the grounds of delay and laches or limitation. One of the exceptions to the said rule is cases relating to a continuing wrong. Where a service related claim is based on a continuing wrong, relief can be granted even if there is a long delay in seeking remedy, with reference to the date on which the continuing wrong commenced, if such continuing wrong creates a continuing source of injury. Borrowing from the excerpts reproduced above and considering that the respondent continued to work under the same circumstances, we find and hold that the breach complained of was of a continuing nature, capable of giving rise to a legal injury which assumes the nature of a continuing wrong. It follows that the appellant's argument that the claims were time barred fails. On the contrary, the said claims fall within the ambit of a continuing wrongs contemplated under section 90.



23. In this case, the issue of leave pay and house allowance are separate. Accrued leave days must be addressed in the context of Section 28(4) of the [Employment Act](#), whereas house allowance is regulated under the Wage Orders, where a minimum wage is paid.
24. Under Section 28(4) of the [Employment Act](#), an employee cannot accumulate annual leaves beyond 18 months unless there is an application to the employer and the same is declined. Such then offers a good basis to claim under such a declined application.
25. In the payment of final dues, the appellant paid for accrued leave days ending 20 January 2020. The record is replete with leave days taken over the years. The award for leave days going back to the year of employment, 1990, was in error. Such is not due.
26. The respondent's employment was regulated under her contract regarding the house allowance. The wage paid of Kshs 65, 000 per month is not a minimum wage. The claim for a house allowance is regulated under the Wage Orders to insulate protected employees who earn a minimum wage.
27. Where parties regulate their employment under a written agreement, unless the benefit of house allowance is specifically allocated, the employee earning above the minimum wage cannot seek to claim a house allowance. This is addressed under Section 31 (2) (a) of the [Employment Act](#) that;
  - (2) This section shall not apply to an employee whose contract of service—
    - (a) contains a provision which consolidates as part of the basic wage or salary of the employee an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation or
28. In this case, the respondent cannot justify a claim for a house allowance, given her employment contract and the wage paid each month.
29. On the issue of the respondent's early retirement on 20 January 2020, the respondent contests that her employment was secured under the employment contract and had no provision or term on early retirement. The change of her employment terms was an unfair termination of employment.
30. The appellants contend that the respondent was given due process and accepted early retirement and the attendant benefits. She accepted the offer and signed the agreement and discharge voucher.
31. Early retirement is a legitimate and valid mode of terminating employment. Where the employee is offered early retirement, there are two options: to accept and continue with employment or accept and take the offered benefits. Once there is acceptance, such is irrevocably accepted and applicable under the provisions of Section 10(5) of the [Employment Act](#). Where a contract of employment is reviewed, or terms changed, the employee must give her written acceptance.
32. In this case, the voluntary acceptance of the early retirement offer resulted in a valid and legitimate termination of employment. Executing the agreement and discharge vouchers without protestations cannot take parties back. From the date of acceptance of the early retirement package on 20 January 2020, the respondent did not file the claim until September 2021.
33. Early retirement lawfully terminated employment as held in the case of [Faiyadh Ahmed Mohamed v Bollore Transport & Logistics Kenya Limited](#) [2021] eKLR and [Gichuhi v Bollore Transport & Logistics Kenya Limited](#) [2023] KEELRC 981 (KLR) Copy
34. The early retirement package agreement took into account 6 months' notice pay. Thus, a case of unfair termination of employment does not arise.



Compensation for 12 months is a remedy removed from the respondent.

35. Severance pay is not available in the case of voluntary early retirement as well as any claim for unexpired term of employment.

**Cross-appeal**

As analysed above, the award of leave pay is not justified.

36. Employment terminated upon early retirement, which was procedurally addressed, and terminal dues paid in full. There was no case of unfair termination of employment, as urged in the Memorandum of Claim or in the cross-appeal, to justify a claim of 12 months' compensation.
37. Upon early retirement, severance pay only accrues from a declared redundancy, which is not the case here.
38. Accordingly, the appeal is allowed in its entirety and the judgment in Mombasa CM ELRC E566 of 2021 is hereby set aside with costs to the appellant. The cross-appeal is hereby dismissed with no orders on costs.

**DELIVERED IN OPEN COURT AT MOMBASA ON THIS 24 DAY OF OCTOBER 2024.**

**M. MBARŪ**

**JUDGE**

