



**Protective Custody Limited v Temesi (Appeal E134 of 2024)
[2024] KEELRC 13392 (KLR) (29 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13392 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
APPEAL E134 OF 2024
NJ ABUODHA, J
NOVEMBER 29, 2024**

BETWEEN

PROTECTIVE CUSTODY LIMITED APPELLANT

AND

RUTH KHAVAKALI TEMESI RESPONDENT

(Being an appeal arising from the Judgment of Honourable RUGURU N. (SPM) delivered in Milimani Chief Magistrates Court, ELRC No. E076 of 2021 on 4th April, 2024)

JUDGMENT

1. Through the Memorandum of Appeal dated 30th April, 2024, the Appellant appeals against the whole of the Judgment of Honourable Ruguru N. (SPM) delivered on 4th April, 2024.
2. The Appeal was based on the grounds that:
 - i. The Learned Trial Magistrate erred in law and fact in finding that the Claimant had been unfairly terminated. A finding that is not supported by the evidence on record.
 - ii. The Learned Trial Magistrate erred in law and fact in awarding the Claimant one month's salary in lieu of notice.
 - iii. The Learned Trial Magistrate misdirected herself on the law and facts by awarding the Claimant 6 months' salary compensation for unfair termination.
 - iv. The Learned Trial Magistrate erred in law and fact in awarding the Claimant leave pay yet the same is not supported by the law and the evidence on record.
 - v. The Learned Trial Magistrate erred in fact and in law by awarding the Claimant underpayment a finding that is not supported by the law and the evidence on record.



- vi. The Learned Magistrate erred in fact and in law by awarding the Claimant salary for the months of July, August and September 2019.
 - vii. The Learned Trial Magistrate erred in law by shifting the burden of proof to the Respondent and in weighing the Respondent's evidence on a higher scale than that of balance of probabilities.
 - viii. The Learned Trial Magistrate erred in law in awarding costs and interest to the Claimant.
3. The Appellant prayed that the judgment of the lower court together with the cost of the suit and interest be set aside, the entire Claimant's claim be dismissed with costs and the costs of the lower court and of this Appeal.
 4. The Appeal was disposed of by written submissions.

Appellant's Submissions

5. The Appellant's advocates Njuguna & Partners Advocates filed written submissions dated 25th September, 2024. On the issue of whether the trial Magistrate erred in finding the Respondent was unfairly terminated counsel submitted that section 47(5) of the Employment Act puts the burden of illustrating termination has occurred on the employee while relying on among others the case of Herbert Wafula Waswa v Kenya Wildlife Services (2020) eKLR on this assertion.
6. Counsel submitted that the Respondent alleged to have been terminated due to the fact that she proceeded for maternity. That she relied on discharge form as proof she went for maternity. Counsel relied on section 29(4) of the Employment Act to submit that the Respondent was entitled to give not less than 7 days' leave or shorter notice as may be reasonable in the circumstances. Counsel relied on section 29(5) of the act to submit that the notice should be in writing yet the Respondent did not give any notice in writing or apply for her maternity leave. That she absconded from work and did not return.
7. Counsel relied on the case of Florence Wambui Gitau vs Eclipse International (2019) eKLR to submit that a claim for maternity leave may be supported by a medical certificate or a birth certificate. That the Respondent did not produce such document as she did not produce a notification of birth but produced a discharge form which had inconsistencies on date of birth and date of immunization being earlier than date of birth. The date of immunization was 27th June, 2019 and date of birth 28th June, 2019. The form did not have the hospital's stamp and payment of hospital fee of Kshs 15,000/= indicated.
8. Counsel submitted that despite the Respondent filing out other forms she failed to apply for maternity leave. That the Respondent alleged that she informed the Appellant through telephone but no such calls were produced in court. That the Respondent absconded duty on 27th June, 2019 and hence terminated her own services by failing to report to her station which was the basis of the Appellant issuing the letter dated 1st July, 2019.
9. Counsel submitted that the Respondent never returned her uniform, she never cleared with the Appellant or received a termination letter hence she was not unfairly terminated. That she was not entitled to any notice pay or compensation.
10. On the issue of whether the trial magistrate erred in awarding the Respondent terminal dues counsel submitted that the trial court in awarding the Respondent the terminal dues weighed its case on a higher scale than that of the Respondent. That the trial court failed to scrutinize the evidence furnished



by the Appellant while relying on section 107(1) of the Evidence Act on evidential burden on whoever who alleges some facts to prove them.

11. Counsel relied on the case of Patrick Lumumba Kimuyu vs Prima Fuels (K) Limited (2018) eKLR on employee discharging their burden of proof of their claim. Counsel submitted that the Respondent was not entitled to salary for July, August and September, 2019 as she failed to comply with requirements of section 29 of the Act. Counsel relied on the case of AKO V Abson Motors Limited (2021) eKLR on this assertion.
12. Counsel submitted that the Respondent was also not entitled to underpayments as her salary was based on number of hours worked as she was also working with Neatcare Cleaning services within the same premises. That she was part-time employee since she had another job. That she was not entitled to annual leave because the Appellant produced forms to prove that the Respondent did proceed on leave upon applying for the same. That the trial court did not consider those forms in arriving at its decision.
13. Counsel further submitted that the calculation by the trial court on the awards awarded was erroneous as the Respondent worked for a period of 2 years 10 months. That the leave days earned would be 59.5 days which would be the Respondent's daily salary multiplied by number of leave days to totaling to Kshs. 16,441,83/= That this notwithstanding counsel maintained that the Respondent utilized her leave days. That all the awards made by the trial court should be set aside.

Respondent's Submissions

14. The Respondent's Advocates Mwaura Kamau & Co. Advocates filed written submissions dated 22nd October 2024. Counsel submitted that the Respondent was employed by the Appellant in August 2016 and worked until 27th June, 2019. That on 27th June, 2019 the Respondent reported for duty at 6.00 am and worked until 11.00 am when she started experiencing labour pains. That she had previously sought for maternity leave but had been denied the same by the Appellant. She was told she could only proceed on the said leave after finding a suitable replacement.
15. Counsel submitted that the Respondent orally sought leave when labour pains began and proceeded to Wangige Health Centre where she delivered a baby girl on the same date and was discharged on 28th June, 2019. That she could not go back to work immediately and waited until 15th September, 2019 and when she reported back to work, she was informed by her supervisor that her position had already been taken up by someone else and that she had been terminated.
16. Counsel further submitted that at the hearing the Respondent produced discharge summary from Wangige Level 4 Hospital which indicated the date of admission as 27th June, 2019 and date of discharge as 28th June, 2019. That the mode of delivery is also indicated as S.V.D and date of delivery indicated as 27th June, 2019.
17. Counsel submitted that at the trial court hearing the Respondent called one witness who was the head of operation and who admitted that the Respondent was its employee working as a day guard. That the Respondent did not apply for maternity leave and never communicated her whereabouts. In cross examination he admitted that the Appellant was aware of the Respondent's pregnancy but according to him the respondent did not inform the appellant of her due date.
18. Counsel submitted that Section 29 (4) of the Employment Act stipulates that an employee is entitled to maternity leave after giving a notice of not less than 7 days or shorter notice as maybe reasonable in the circumstances. That the application for leave was in a prescribed form and employees could only access the said forms if they were made available by the Appellant. In this case the Respondent orally sought



for leave from her supervisor who instead of providing the prescribed form so that the Respondent could fill them informed her to wait for a replacement.

19. Counsel relied on among others the case of Florence Wambui Gitau Vs Eclipse International (2019) eKLR while submitting that the claim for maternity leave may be supported by a medical certificate or a birth certificate. The Respondent in this case produced a medical certificate in form of a discharge summary from Wangige Level 4 Hospital. That the baby was delivered on 27th June, 2019 which was also the date of immunization. That the discharge summary was in the letter head of Wangige Level 4 Hospital hence the issue of hospital stamp does not arise.
20. On the issue of salary for the months of July, August and September 2019 counsel submitted that the Respondent's evidence on non-payment of the 3 months was not rebutted in any way.
21. On the issue of underpayment, Counsel submitted that the Appellant's witness did not deny that the Respondent was earning Kshs. 8,290/- while working for the Appellant and in support of her evidence produced a bank statement as evidence. That the Appellant alleged that the Respondent was paid for hours worked but did not tender any evidence on how much the Respondent was earning per hour. There was no contract between the parties to stipulate those terms. The Appellant's witness confirmed that the Respondent was paid a monthly salary.
22. Counsel submitted that the minimum wage for a day guard working in Nairobi between August 2016 and May 2017 was Kshs. 10,954/-, between June 2017 and May 2018 Kshs. 12,926/- and between June 2018 to June 2019 Kshs. 13,572/- and that the Respondent was being underpaid for the entire duration she worked with the Appellant. That the trial court finding of award of Kshs 153,396/= was correct and based on evidence on record.
23. On annual leave of Kshs. 32,870/- counsel submitted that the Appellant annexed only 3 off-duty application forms purportedly taken by the Respondent and not leave. That as the custodians of the Respondent's records the Appellant did not produce any record to show that the Respondent went for annual leave under the provisions of section 74 (1) of the *Employment Act*. That the Respondent was entitled to her annual leave of at least two uninterrupted working weeks under section 28(3) of the *Employment Act*.
24. On the issue of working for a different entity known as Neat Care Cleaning Services, Counsel submitted that the Appellant's witness informed the trial court that its employees were not prohibited from doing any side hustles as long as the same did not interfere with employees working schedule. That the Respondent would report at the Appellant work place at 6.00 am and leave at 6.00 pm. That the side hustle at Neat Care Cleaning services which was next to her place of work was done at 5.00 am then she would proceed to her place of work at 6.00 am.
25. Counsel submitted that the Appellant said that the Respondent was not entitled to the same benefit as a full-time employee but did not produce any document to support its evidence that the Respondent was working as a part time employee.
26. Counsel submitted that if the Respondent was being paid on hourly basis then there was no justification for paying her while she was off duty since her payment was based on the number of hours worked and one does not qualify to be paid while being off duty. That this court should take judicial notice of the fact that the Respondent was employed as a day guard and the nature of their work where they work the whole day and not part time. That assuming they were working on shifts the Appellant did not produce on the length of the said shifts per day and payment for the same to arrive at the monthly salary of Kshs 8,290/=.



27. On termination Counsel submitted that the Appellant went ahead and terminated the Respondent's employment alleging that she had deserted her employment. That the Respondent's version was that on 27th June 2019 she proceeded on maternity leave, straight from her place of work and reported back to work on 15th September 2019 only to be informed that her services had been terminated despite the Appellant's witnesses confirming that it was aware of the Respondent's pregnancy. That she was not taken through any disciplinary process hence her termination was unfair.
28. On the Appellant's defence of desertion of duty by the Respondent counsel submitted that if indeed the Appellant had not terminated the Respondent it ought to have shown the efforts it made to try and get the Respondent back to work or at least to know the reason behind her failure to report to duty.
29. Counsel submitted that even if the Appellant did not know that the respondent was pregnant and had delivered a baby, the Appellant did not tender any evidence, oral or documentary, to show the efforts it made to know the whereabouts of the Respondent and why she was not reporting for employment despite the fact that the Respondent had worked with the Appellant for a period of close to three (3) years. The Appellant did not prove that the Respondent did not intend to resume work yet the Respondent alleged to have returned to work on 15th September,2019 only to find she had been terminated.
30. Counsel submitted that the procedure adopted by the Appellant in terminating the Respondent's services as provided for under Section 41 of the Employment Act was not followed and relied on the case of Walter Anuro vs Teachers Service Commission (2013) eKLR on the requirement of both substantive and procedural fairness before termination. Counsel relied on section 45(2) of the act on what amounts to unfair termination. Counsel further relied on the case of Dickson Matingi Vs DB Schenker Ltd (2016) and submitted that the employer has to demonstrate and/or prove that the employee had no intention of resuming work and that disciplinary action was contemplated on the ground of the desertion.
31. Regarding the process of termination, Counsel relied on the case of the case of Rebecca Ann Maina & 2 Others Vs Jomo Kenyatta University (2014) eKLR and submitted that in order for an employee to respond to the allegations made against them, the charge must be clear and the employee must be afforded sufficient time to prepare their defence. The said termination was both substantively and procedurally unfair as the trial court found.
32. Counsel therefore submitted that the lower court finding that the Respondent was entitled to one-month salary in lieu of notice was correct and any appeal regarding that finding should be dismissed.

Determination

33. The court has considered the pleadings and submissions filed by the both parties herein and proceeds that the principles which guide this court in an appeal from a trial court are now well settled. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
34. In this case, judgment was entered in favour of the Claimant against the Respondent. The trial Court found that the termination was unfair and awarded the claimant one-month salary in lieu of notice



Kshs 8,290/=, salary for months of July, August and September, 2019, at Kshs. 24,870/=, leave Kshs 32,870/=, underpayment Kshs 153,396/= and 6 months' compensation for unfair termination Kshs 49,740/= together with costs and interests.

35. The Appellant appeals on the whole of the Judgment. The court finds that the issues placed by the parties for determination in the appeal are with regard to whether the trial court was right when it held that the Respondent was unfairly terminated and if she was entitled to reliefs sought.
36. This court has therefore come up with two main issues;
 - i. Whether the trial court erred by finding that Respondent's termination of employment was unfair and unlawful
 - ii. Whether the trial learned Magistrate erred in awarding the Respondent her terminal dues.

Whether the trial court erred by finding that Respondent's termination of employment was unfair and unlawful

37. It is not in dispute that the Respondent was an employee of the Appellant from August, 2016 to June 2019 when she proceeded on her maternity leave. The Appellant confirmed being aware of her pregnancy but proceeded to allege that the Respondent deserted duties while on maternity leave. The trial court on the other hand found that the Respondent's termination was unfair both substantively and procedurally.
38. The courts have always held that for termination to pass fairness test there should be both substantive and procedural fairness. This court refers to the holding in Janet Nyandiko versus Kenya Commercial Bank Limited (2017) eKLR among others.
39. The court is of the view that in as much as the Respondent had a duty under section 47(5) of the *Employment Act* to prove that termination occurred the trial court was right to find that the Respondent illustrated that the termination had occurred and the burden shifted to the Appellant to illustrate that the reasons for the termination were fair under the said provision.
40. Under Section 44(4) (a) of the *Employment Act* 2007, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal. The Appellant has relied on the defence of desertion that the Respondent had no intention of returning to the place of work.
41. In allegations of desertion the court is guided by the sentiments in the case of Stanley Omwoyo Onchweri v Board of Management Nakuru YMCA Secondary School [2015] eKLR, where the court held that:-
 18. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.
42. The Appellant claims the respondent deserted duty on 27th June, 2019 yet the Respondent states that on this date she reported to work at 6.00 am and she started experiencing labour pains at around 11.00 am and left. That the Appellant had denied her maternity leave citing that a replacement had to be found. She therefore sought the leave orally since Appellant failed to give her the leave forms in its possession for her to apply for the leave in writing.
43. The court appreciates that section 29(4) and (5) of the *Employment Act* requires an employee to give a notice of 7 days or any reasonable time in the circumstances and the same to be in writing. The Court



however is of the view that the Appellant made it so hard for the Respondent to apply for her leave because a replacement had to be found first.

44. The court relying on the case of *Florence Gitau vs Eclipse International* (2019) eKLR appreciates that the proof of maternity need to be supported by medical certificate or a birth certificate. In this case the Respondent produced a discharge summary which was conclusive evidence that she delivered on 27th June, 2019 and was discharged on 28th, June, 2019. The discharge had the letterhead of the hospital hence the hospital stamp was immaterial.
45. In addition, if the Respondent absconded duties the Appellant did not demonstrate that it commenced any disciplinary action against the Claimant under Section 41 of the *Employment Act* after she allegedly failed to report on duty.
46. It was held in the case of *Richard Kiplimo Koech Vs Yuko Supermarket Ltd* [2015] eKLR that absconding duty is an act of misconduct on the part of the employee, in which case the requirements of Section 41 of the *Employment Act* obtain.
47. In *Joseph Nzioka v Smart Coatings Limited* [2017] eKLR Nduma J. observed that
“Dismissal on account of absconding must be preceded by evidence showing that 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.”
48. In the present case, the Court is not satisfied that the Appellant has on a balance of probabilities discharged its onus of establishing that the Respondent absconded/deserted duty. This court agrees with the trial court finding that the Appellant did not have fair reasons to terminate the Respondent.
49. On the procedural fairness as provided for under section 41 of the *Employment Act* this court notes that the same was never adhered to as the Appellant did not issue any show cause letter to the Respondent on the issue of deserting/absconding of duties, the Appellant was never invited for any disciplinary hearing hence the Respondent violated the clear provisions of section 41 of the Act. In that regard the Court is guided by the holding in the case of *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2014] eKLR that: -

Section 41 of the *Employment Act* is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative.
50. In conclusion the court agrees with the trial court’s decision that the Respondent’s termination was both substantively and procedurally illegal, unfair and unjustified.

Whether the trial learned Magistrate erred in awarding the Respondent her terminal dues.

51. On the issue whether the six months’ salary award as compensation was excessive and the trial court never justified the same, this court as an appellate court would like to reiterate that it can only interfere with the discretion of the trial court in ordering compensation if it is sufficiently shown that there was an error on some matters leading to erroneous decision as was held on the case of *Kenya Revenue Authority & 2 others v Darasa Investments Limited* (2018) eKLR that:

The court ought not to interfere with the exercise of discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that



it be manifest from the case as a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice.

52. This court will therefore disturb an award if it is shown that the trial court misdirected itself in some matter hence arriving at a wrong decision. In this case the trial court stated that it considered the unfair termination of the Respondent, the period she would have continued to work for the Appellant and the period already worked and awarded the six months compensation. The court finds it justified and does not deem it right to interfere with this discretion. However, the calculation ought to have been based on the legal minimum wage of Kshs 13,572/= at the time of termination and not what the Respondent was paid. The trial court calculation is therefore set aside to reflect the correct calculations.
53. The award of one month in lieu of notice was also justified after finding that the Respondent was unfairly terminated without notice as provided for under section 35 of the Employment Act. The court also agrees with the trial court that the Respondent was entitled to payment of salary for the months of July, August and September 2019 while on maternity leave since no evidence was tendered by the Appellant that she was paid. The same should be based again on the legal minimum wage of Kshs. 13,572/= as stated above.
54. On the issue of underpayments this court also agrees with the lower court and appreciates that the Respondent was employed as a day guard from 6.00 am to 6.00 pm. That the Respondent performed her side hustles outside the working hours and in any event the Appellant did not have any issues with her side hustle.
55. On the claim for leave again this court agrees with the trial court that the Appellant as the custodian of employment records only produced 3 off-duty forms which were paid for. The Appellant did not produce any annual leave application to show that the Respondent took her leave. This is a statutory requirement under section 28 of the Employment Act. However, this court notes that the same under section 90 of the Employment Act could only be claimed three years from the date of filing of the claim. In this case the Respondent was terminated in June 2019 and the claim was filed in November, 2020 which was more than one year after her termination. She could claim for part of 2019 worked, 2018 and part of 2017 leave which was cumulatively 2 years leave since one year was lost. In the case of Charles Muthusi Mutua v Kathi No Kakoka Services Limited [2022] eKLR the court had this to say:-

Bearing in mind the provisions of Section 90 of the Employment Act, I can only grant untaken unpaid for leave days for the three years preceding the date of filing this claim. Not the five years sought by the claimant. Therefore, Kshs. 27,844.50. Leave to employees is a statutory entitlement, and an obligation on the employer to ensure that the right is realized, under section 28 of the Employment Act. Where an employee alleges that he did not enjoy this right during the currency of the employment fully or to a certain extent, then it behoves the employer to disabuse the allegation by tendering evidence before the trier. The Respondent as the employer didn't.

56. In the upshot the Appeal is found unmerited is hereby dismissed with costs save for the numerical calculations which have been amended as hereunder:
 - i. One- month salary in lieu of notice
..... Kshs 13,572/=
 - ii. 6 months' compensation..... Kshs 81, 432/=
 - iii. July, August and September 2019 salary...Kshs 40,716=



- iv. Underpayments...Kshs 153,396/=
- v. Leave (2 years).....Kshs 27,144/=
- Total.....Kshs 316,260/=
- vi. This award shall be subject to taxes and statutory deductions but shall attract interest at Court rates from the date of this judgment until payment in full.

57. It is so ordered.

DATED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2024

DELIVERED VIRTUALLY THIS 29TH DAY OF NOVEMBER, 2024

ABUODHA NELSON JORUM

PRESIDING JUDGE-APPEALS DIVISION

