



**Randu v Station Square Investment Ltd (Appeal E022 of 2023)
[2024] KEELRC 13219 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13219 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E022 OF 2023
AK NZEI, J
NOVEMBER 22, 2024**

BETWEEN

KAZUNGU DANIEL RANDU APPELLANT

AND

STATION SQUARE INVESTMENT LTD RESPONDENT

JUDGMENT

1. The Appellant was the Claimant in Mombasa Chief Magistrate’s Court Employment Case No. 140 of 2019 whereby he had sued the Respondent herein seeking the following reliefs:-
 - a. A declaration that the Claimant’s termination from employment was unfair.
 - b. One month salary in lieu of notice Kshs.21,745/=.
 - c. Salary for the month of December 2018 Kshs.21,745/=.
 - d. Gratuity pay for 18 years worked (18 days salary for every year worked being Kshs.21,745/26 days x 18 days x 18 years) Kshs.270,976.15.
 - e. Unpaid house allowance for 18 years being (15% of Kshs.21,745/3,261 x 216 months) Kshs.704,376/=.
 - f. Unpaid overtime for 18 years worked (2¹/₂ excess hours per day) x 1.5 x 216 months Kshs.2,195,856/=.
 - g. Certificate of service.
 - h. Costs of the suit and interest.
 - i. Any other relevant remedies that the Court may deem fit and just to grant.



2. The Appellant had pleaded that he had been verbally employed by the Respondent on 24th December, 2000 as a Pump attendant (and later shifted to a messenger), earning a monthly salary of Kshs.21,745/= as at the time of termination. It was the Appellant's pleading:-
 - a. that the Respondent paid the Appellant's salary in cash, whereupon the Appellant used to affix his signature on a voucher and a muster roll which was kept by the Respondent.
 - b. that on or about 24th December, 2018 at around 12.30 pm while the Appellant was in the course of his duties, his supervisor (one Joseph Kiwo), told him to take off his uniform, to hand it over and to go home.
 - c. that on the Appellant seeking to know the way forward from the Respondent's Manager (one Ahmed Ahmad), the said Manager told him that he was following instructions from the Respondent's director.
 - d. that on visiting the Director's (Abulsalam's) office at Changamwe, the said director sent the Appellant back to the Manager to sort out their issues, and that the said Manager gave him the information earlier given, that he was following instructions.
 - e. that the Appellant's employment was unfairly terminated without following due procedure and without valid reasons.
 - f. that the Appellant used to report to work at 7.00 am and to leave at 5.30 pm, without any break in-between, and without compensation for the extra two and a half hours worked.
 - g. that the Respondent did not provide housing or pay house allowance to the Claimant throughout the period of employment.
 - h. that the Appellant did not utilize his leave days for the year 2018, and that his employment was terminated without notice; and without payment in lieu thereof.
 - i. that the Appellant was not paid for the days worked in December 2018.
 - j. that the Respondent's actions offended Sections 41, 43, 44, 45, 49 and 50 of the Employment Act; and Convention 158 (Termination of Employment Convention) of the International Labour Organization's Conventions.
3. Documents filed alongside the Appellant's Memorandum of Claim included an affidavit in verification of the claim, the Appellant's written witness statement dated 7th February, 2019 and an evenly dated list of documents, listing 3 documents. The listed documents were copies of the Appellant's NSSF statement, a demand letter dated 9th January, 2019 and registered post payment receipts dated 15th January, 2019.
4. The Respondent subsequently filed Response to the Appellant's claim, and denied the same. The Respondent pleaded that the Appellant absented himself from work without leave as from on or about 20th December, 2019.
5. Documents filed alongside the Respondent's Response to the Appellant's Response included a witness statement of Ahmada A. Hamid dated 26th October, 2020 and an evenly dated list of documents listing 16 documents. The listed documents included an Employment Master Roll (some 2 pages), letters to the Appellant dated 13th, 19th, 20th and 24th December, 2018, letters to County Labour Office (Mombasa) dated 31st December, 2018 and 22nd January, 2019 respectively, salary payslips/vouchers, applications for loans, warning letters, petty cash vouchers evidencing loans taken, Appellant's apology



letters of various dates, NSSF statement of account, application for annual leave dated 27th March, 2018 and approval of annual leave dated 27th March, 2018.

6. At the trial, the Appellant adopted his filed witness statement, which replicated the averments made in the statement of claim as his testimony. He further re-stated the said averments in evidence. He testified that he was not being paid house allowance. He denied having been issued with any warning or termination letters, or having been issued with the letters sent to the Labour Officer; and denied having been paid the house allowance shown on the payslips filed by the Respondent. The Appellant denied having absconded duty as alleged by the Respondent, and stated that the signature(s) on the letters produced by the Respondent were not his, and denied having taken leave in 2018.
7. Cross-examined, the Appellant testified that he was employed in 2001, and that he was being paid in cash, and that the vouchers filed by the Respondent were the ones that they were being paid with. That in January 2018, he applied for leave for the year 2018. That the Master roll filed by the Respondent was the one that they used to sign and that he paid NSSF contributions.
8. The Respondent called one witness, Ahmada Ahmed Hamid (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the documents referred to in paragraph 5 of this Judgment.
9. Cross-examined, RW-1 testified that the Appellant had been employed by the Respondent in 2003; and had worked for the Respondent for 16 years. That the Appellant disappeared on 21st December, 2018 and was not terminated; and did not give any explanation regarding his absence. That there was no proof that the letters written by the Respondent in December 2018 were received by the Appellant. That the Appellant never worked overtime, and had an outstanding loan with the Respondent as at the time he left employment.
10. The trial court delivered its Judgment on 23rd February, 2023 and dismissed the Appellant's suit with no order as to costs. The trial Court rendered itself thus:-

“Evidence so far on record also indicates that the Claimant was rude and disrespectful to the Respondent's Management on 20th December, 2018. He also skipped work on 19th December, 2018 without permission and he was lazy . . . The Claimant was not forced to exit his work place. Cumulatively, I am not satisfied that the Claimant has discharged his burden on a balance of probability to establish that the Respondent terminated his services.

. . . The process leading to the Claimant's termination in the opinion of the Court cannot be faulted by the Claimant. The Claimant was reckless and rude and lazy through his conduct, guided by the evidence on record. The Respondent did adduce cogent evidence to challenge the evidence so far adduced by the Claimant.

Having all the above into consideration, I am reluctant to find a case of wrongful, unfair and unlawful termination of the employment of the Claimant by the Respondent and that the Claimant is entitled to the reliefs sought in the Memorandum of Claim, guided by the evidence so far on record.

In the result, the Claimant's claim against the Respondent is dismissed with no orders as to costs, all circumstances considered.”

11. Aggrieved by the trial Court's Judgment, the Appellant preferred the present appeal and set forth eight grounds of appeal, stating:-



- a. That the learned Magistrate erred in law and fact in finding that the Appellant deserted duty by relying on letters provided as evidence by the Respondent which lacked acknowledgement of receipt.
 - b. The learned Magistrate erred in law and fact in finding that the Appellant absented himself without sufficient cause by fully relying on evidence by the Respondent without due regard to the Appellant's evidence.
 - c. The learned Magistrate erred in law and fact in finding that the Appellant was not forced to exit his work place, yet on 24th December, 2018, while in the course of his duties, the Appellant was verbally asked by his supervisor to take off his uniform, to hand it over and to leave the premises.
 - d. The learned Magistrate erred in law and fact in finding that the Appellant failed to discharge his burden on a balance of Probability and to establish a prima-facie case, yet the Appellant provided evidence that his termination was not procedurally fair and certainly not in line with Sections 41, 43, 44 and 45 of the *Employment Act*.
 - e. The learned Magistrate erred in law and in fact in finding that the Appellant was not wrongfully, unfairly and unlawfully terminated.
 - f. The learned Magistrate erred in law and in fact in not awarding the Appellant the reliefs sought in the Memorandum of Claim.
 - g. The learned Magistrate erred in law and in fact by completely disregarding the Appellant's evidence on record.
 - h. The learned Magistrate erred in law and in fact by dismissing the Appellant's claim.
12. The Appellant sought the following reliefs on appeal:-
- a. That the entire Judgment of Hon. D. O. Mbeja (PM) delivered on 23rd February, 2023 in Mombasa CM (ELR) Case No. 140 of 2019 be set aside.
 - b. That the appeal be allowed.
 - c. That the Appellant be awarded costs of the appeal and those in the trial court.
13. This is a first appeal, and the evidence adduced in the trial court is before this Court for fresh re-evaluation. This Court, however, takes cognizance of the fact that it never saw or heard the witnesses first hand. The duty of a first appellate court was aptly stated in the case of *Selle & Another – vs – Associated Motor Boat Co. Ltd & Another* [1968] E.A 123 and in *Peters – vs – Sunday Post Limited* [1958] E.A 424.
14. I will handle the grounds of appeal together. Having considered the pleadings filed in the trial court and the evidence adduced thereon, issues that fall for determination, in my view, are as follows:-
- a. Whether the Appellant's employment was terminated by the Respondent and if so, whether the termination was unfair.
 - b. Whether the Appellant was entitled to the reliefs sought in the trial court, or to any of them.
15. On the first issue, the Appellant had pleaded and testified that while he was in the course of performing his duties on 24th December, 2018, his supervisor verbally instructed him to take off his uniform, to hand it over and to leave the Respondent's premises. That he sought audience with the Respondent's



- Manager (RW-1) who told him that he was following instructions. That a visit by the Appellant to the office of the Respondent's Director at Changamwe did not help as the Director send the Appellant back to the Manager, who again told him that he was following instructions.
16. On the other hand, the Respondent pleaded and its witness (RW-1) testified that the Appellant's employment was not terminated by the Respondent, and that it was the Appellant who absconded duty with effect from 21st December, 2018, and that the Respondent was unable to trace him. It was the Respondent's (RW-1's) evidence that the Respondent wrote letters to the Appellant after he allegedly absconded duty; and produced in evidence letters dated 13th December 2018, 19th December 2018, 20th December 2018 and 24th December 2018 addressed to the Appellant. Interestingly, the said letters do not bear any address of the Appellant, and only have the Appellant's name as the addressee thereof. Further, the said letters are not shown to have been received by the Appellant and/or to have been served on him. The Appellant denied having received them. The Respondent did not even attempt to tell the Court how those letters were allegedly transmitted to the Appellant.
 17. The Respondent's allegation of the Appellant having absconded duty was not proved. No evidence was adduced in court by the Respondent to show that the Appellant indeed absconded duty; and that the Respondent tried to reach him to establish his whereabouts.
 18. On a balance of probability, I find and hold that the Appellant's employment was terminated by the Respondent, and that the termination was unfair in that the same was without notice to the Appellant pursuant to Section 35(1)(c) of the *Employment Act*, was not based on a valid reason, and the Appellant was not accorded an opportunity to be heard pursuant to Section 41 of the said Act.
 19. On the second issue, and having made a finding that termination of the Appellant's employment was unfair, I award the Appellant the equivalent of seven months' salary as compensation for unfair termination of employment, that is Kshs.21,745 x 7 =152,215; which I award the Appellant.
 20. The claim for Kshs.21,745/= being one month salary in lieu of notice is allowed pursuant to Section 35(1)(c) of the *Employment Act*.
 21. The claim for Kshs.704,376/= being unpaid house allowance is declined as evidence on record shows that the Appellant's monthly salary was inclusive of house allowance.
 22. The claim for Kshs.2,195,856/= being unpaid overtime over a period of 18 years was not specifically pleaded, and was not proved, and is declined. There was no attempt by the Appellant to demonstrate, by pleadings and evidence, the amounts payable during particular years of employment and the Minimum Wage Orders/rates applicable during such years. Claims for unpaid overtime are in the nature of special damages and must always be specifically pleaded and strictly proved, on a balance of probability.
 23. The claim for Kshs.21,745/= being unpaid leave for the year 2018 is declined, as evidence adduced by the Respondent shows that the Appellant took leave in the year 2018.
 24. The claim for Kshs.21,745/= being salary for the month of December 2018 is allowed. The Respondent did not present any evidence demonstrating payment of, and receipt of the December 2018 salary by the Appellant. The allegation of an outstanding loan was not proved. Further, the Respondent did not raise a Counter-claim.
 25. The claim for Kshs.270,976.15 being gratuity is declined. The Appellant did not demonstrate contractual entitlement to such payment. Further, the Appellant was a member of, and a contributor to NSSF.



- 26. The prayer for issuance of a certificate of service is allowed pursuant to Section 51(1) of the Employment Act.
- 27. In sum, and having considered written submissions filed on behalf of the parties herein, the trial Court’s Judgment delivered on 23rd February, 2023 dismissing the Appellant’s suit is hereby set aside, and in substitution thereof, Judgment is hereby entered for the Appellant against the Respondent as follows:-
 - a. Compensation for unfair termination of employment Kshs.152,215/=.
 - b. One month salary in lieu of notice Kshs.21,745/=.
 - c. Salary for the month of December 2018 Kshs.21,745/=.

Total = Kshs.195,705/=
- 28. The awarded sum shall be subject to statutory deductions pursuant to Section 49(2) of the Employment Act.
- 29. The Appellant is awarded interest on the awarded sum at Court rates from the date of the trial Court’s Judgment.
- 30. The Respondent shall issue a Certificate of Service to the Appellant pursuant to Section 51(1) of the Employment Act. This shall be done within thirty days of this Judgment.
- 31. The Appellant is awarded costs of the appeal, to be taxed on the lower scale.
- 32. The Appellant is awarded costs of the suit in the Court below.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024
AGNES KITIKU NZEI

JUDGE

Order

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

.....Appellant

.....Respondent

