



**Ineet Millers Company Limited v Ombata (Employment and Labour Relations Appeal E008 of 2021) [2024] KEELRC 2725 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2725 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E008 OF 2021  
MA ONYANGO, J  
NOVEMBER 7, 2024**

**BETWEEN**

**INEET MILLERS COMPANY LIMITED ..... APPELLANT**

**AND**

**JACKLINE NYACHIO OMBATA ..... RESPONDENT**

**JUDGMENT**

1. The Appellant herein was the Respondent, while the Respondent herein was the Claimant in Eldoret CMEL NO. 44 of 2018 in which, the Respondent herein had sued the Appellant vide a statement of Claim dated 11<sup>th</sup> September 2018 seeking compensation and terminal dues for the alleged unfair termination of her employment.
2. After hearing the parties, the trial court delivered its judgment on 23<sup>rd</sup> July 2021 and held that the Respondent's employment had been terminated unfairly by the Appellant. The Respondent was awarded compensation for the alleged unfair termination.
3. The Appellant being dissatisfied with the said Judgement filed the instant appeal vide the Memorandum of Appeal dated 14<sup>th</sup> June 2023 and filed in court on the even date. It raises the following grounds of appeal:
  - i. The Honourable Magistrate erred in law and fact by failing to note that the Respondent had failed to discharge her legal and evidentiary burden of proof.
  - ii. The Honourable Magistrate erred both in law and fact by holding that the Respondent was unfairly terminated without adequate and sufficient evidence in support of the allegation.
  - iii. The Honourable Magistrate erred both in law and fact by holding that the Respondent had worked for the Appellant for a period of 5 years and awarding severance pay for the period without evidence to prove the same.



- iv. The Honourable Magistrate erred both in law and fact by awarding the Respondent Severance Pay despite the Appellant having made NSSF contributions.
  - v. The Honourable Magistrate erred both in fact and law by awarding the Respondent 12 months' salary as compensation for unfair termination without a proper justification.
  - vi. The Honourable Magistrate erred in law and fact by awarding the Respondent a sum of KES. 219,00 as payment for over time without evidence to prove the same.
  - vii. The Honourable Magistrate erred in law and fact by disregarding a binding employment contract between the Appellant and Respondent executed in the year 2017.
  - viii. The Honourable Magistrate erred in law and fact by disregarding the fact that the alteration of the terms of the contract were in favour of the Respondent.
  - ix. The Honourable Magistrate erred both in law and fact by disregarding the importance of insurance against personal injury in an industrial work place.
  - x. The Honourable Magistrate erred in law and fact by disregarding the evidence submitted by the Respondent.
4. The Appellant prays that the Judgment of the Honourable magistrate delivered on 23<sup>rd</sup> July 2021 and the decree thereto be set aside and substituted with a Judgment in favour of the Appellant.
5. The appeal was disposed of by way of written submissions. The Appellants filed submissions on 12<sup>th</sup> October 2023 while the Respondent's submissions were filed on 11<sup>th</sup> October 2023.

#### **Analysis and determination**

6. This being a first appeal I am required to consider the evidence adduced, evaluate it and draw my own conclusions, bearing in mind that I did not hear and see the witnesses who testified. See *Selle & Another Vs Associated Motor Boat Company Ltd & Others* [1968] EA 123.
7. Vide her Statement of Claim dated 11<sup>th</sup> September 2018, the Respondent herein sued the Appellant seeking for orders that;
- i. An order directing the Respondent to pay Claimant the calculated sums as particularized in paragraph 15 above as special damages being Kshs. 2,405,500
  - ii. General damages
  - iii. Interest at court rates (ii) above from the date of termination
  - iv. An order directing and/or compelling the Respondent to issue certificate of service for the Claimant in accordance with section 51 of the *Employment Act, 2007*.
  - v. Costs of this suit with interest thereon at court rates.
  - vi. Any other relief as the court would deem just and expedient to grant.
8. In the statement of claim, the Claimant averred that she was employed by the Appellant in September 2013 at a salary of Kshs 6500 and in December 2017, having satisfactorily served the Respondent's company faithfully and diligently, her employment terms were reviewed upwards to a salary of Kshs 8,500.



9. The Claimant contended that during her employment the Respondent effected deductions from her salary on the pretext that the said deductions were to be paid to the NSSF and NHIF but the Respondent failed to remit the said deductions to the relevant agencies.
10. The Claimant averred that in August 2018, the Respondent introduced new terms in the employment contract, which terms were made unilaterally by the Respondent and attempted to force the Claimant into signing the new contracts.
11. It was the Claimant's contention that upon her refusal to sign the said contract, the Respondent's director verbally terminated the employment of the Claimant.
12. The Claimant averred that the conduct of the Respondent in terminating her services goes against the set International Labour Laws and practices and constitute a violation of *the Constitution*, the *Employment Act* and is a breach of the contract of employment.
13. The Claimant particularized her claim against the Respondent as hereunder: -
  - i. Monthly salary for the month of August 2018.....Kshs. 8,500
  - ii. One month salary in lieu of notice...Kshs. 8,500
  - iii. Service pay for the remaining years due to retirement (basic pay X number of years due to retirement (Kshs. 8,500x12) x 22 years)...Kshs. 2,244,000
  - iv. Compensation damages for unfair/unlawful termination paid at 12 months wages...Kshs. 8,500x12...Kshs.102,000
  - v. Compensation for leave not taken for the whole period worked (5 years x Kshs 8,500)...Kshs. 42,500

Total...Kshs. 2,405,500
14. The Respondent on its part filed a Reply to Memorandum of Claim on 21<sup>st</sup> September 2018 and averred that it employed the Claimant on casual basis when work was available and she was paid on daily basis in accordance with the work done.
15. The Appellant contended that the Respondent worked on casual terms until the year 2017 when she was placed on contractual terms whereupon she signed a six month contract and was also placed on a monthly payroll wherein her wages were enhanced to Kshs. 6,800/- and later further enhanced to Kshs. 9,400.
16. It was the Appellant's case that at the lapse of the six months contract, the Claimant unreasonably refused and failed to renew the same but the Respondent continued to retain her on the same terms.
17. The Appellant averred that in the month of June 2018 or thereabout, while it was in the process of getting insurance policies for all its employees was required to ensure that all the employees were on contractual terms of employment failing which they were not eligible to being insured.
18. It is contended that the Claimant despite being enlightened on the need for insurance policy and all the pre-conditions thereto unreasonably refused to sign the new contracts but instead decided to abscond duty and to institute the current suit against the Respondent.



## **The Evidence Adduced**

19. At trial the Claimant testified as CW1, and adopted her witness statement dated 11<sup>th</sup> September 2018 as her evidence in chief. The Claimant stated that her employment was terminated for refusing to sign the new contracts which according to her, had terms that were unfavorable.
20. She maintained that she worked for the Respondent 6 days a week from 7:30am to 6pm, and was never paid overtime. She also testified that she never went on leave and was never paid house allowance.
21. The Claimant also stated that the respondent deducted NSSF from her salary but that the same was never remitted.
22. On being cross examination, the Claimant stated that she never raised the issue of unpaid overtime with the Respondent and also maintained that she never filled any leave application form.
23. The Respondents called 2 witnesses. RW1, Kenneth Kipngetchi introduced himself as the Director of the Respondent. He adopted his witness statement recorded on 20<sup>th</sup> March 2019 as his evidence in chief.
24. During cross examination, the RW1 maintained that the Claimant absconded duty. It was his testimony that the Respondent's register showed that the Claimant worked from 7am to 6pm. He also admitted that the Claimant was never given a house allowance and that she never went on leave.
25. On re-examination, RW1 stated that he instructed the guard not to admit employees who had not signed the new contracts.
26. Josephat Kiplimo testified as RW2 and stated that he is a friend to RW1. In his evidence, RW2 basically stated that he advised the Respondents employees to sign the new contracts which had incorporated the insurance cover for all the employees.

## **The Appeal**

### **The Appellant's Submissions**

27. In its submissions dated 9<sup>th</sup> October 2023, the Appellants only submitted on the first ground in the Memorandum of appeal and framed the other issues for determination to be whether the Respondent was unfairly terminated from employment and whether the Respondent is entitled to the awards granted to the trial court.
28. It appears the Appellant in its submissions abandoned the other grounds it had raised in its Memorandum of Appeal dated 14<sup>th</sup> June 2023
29. On the ground that the learned trial magistrate erred in law and fact by failing to note that the Respondent had failed to discharge her legal and evidentiary burden of proof, it was submitted that the Respondent failed to prove that she was employed by the Appellant on permanent terms and not as a casual worker, or that she was dismissed from employment unfairly.
30. The Appellant submitted that the Respondent alleged in her pleadings before the trial court that her employment was terminated by way of constructive dismissal but she failed to prove how the appellant made it considerably difficult for her to continue working with it. It is further averred that the only reason the Respondent tendered during cross examination by way of explaining why she refused to sign a contract and left work was that the contract would enslave her.



31. According to the Appellant, the Respondent failed to prove any ingredient that she was constructively dismissed from employment. In support of this position, the case of *Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Limited* (2014) eKLR was cited. On this basis, the Appellant submitted that the Honourable Magistrate erred both in law and fact in returning a finding that there was unfair, wrongful and unlawful dismissal by the Appellant.
32. While placing reliance on the case of *Kenya Union of Commercial Food and Allied Workers v Mwana Black Smith Limited* (2013) eKLR, the Appellant submitted that at the time of the alleged dismissal, there was no contract that existed between the Appellant and the Respondent. According to the Appellant, the fact that the Respondent declined to sign the contract is a clear indication that the employment relationship terminated upon effluxion of time in the previous contract.
33. In conclusion the Appellant submitted that since there is no proof of existence of an employment relationship between the Appellant and the Respondent at the time of the alleged dismissal, the entire claim cannot hold and must fall apart.

### **Respondent's Submissions**

34. The Respondent on its part identified the main issues for determination flowing from the Appellant's Memorandum of Appeal to be:
  - i. Whether the Respondent was properly awarded 12 months' salary for unfair termination.
  - ii. Whether the Respondent was properly awarded severance pay.
  - iii. Whether the Respondent was properly awarded 15 years' salary.
  - iv. Whether the Respondent was properly awarded payment for overtime.
  - v. Whether the employment contract executed in 2017 should have had any impact on the determination of the Court.
  - vi. Whether insurance against personal injury should have had any impact on the determination of the Court.
  - vii. Who should bear the costs of the Appeal?
35. On the first issue as to whether the Respondent was properly awarded 12 months' salary for unfair termination, the Respondent submitted that RW1, admitted to the Court that the Respondent was fired for refusing to sign an employment contract that was presented to her. The Respondent submitted that the Appellant's director admitted in his testimony that he had instructed the guards not to let in any employee who had refused to sign the new employment contract. It is on this basis that the Respondent submits that she was unfairly terminated.
36. The Respondent therefore submitted that the allegation that the learned Magistrate awarded the Respondent 12 months' pay without a proper justification is spurious at best and ought to be disregarded.
37. As regards the second issue, the Respondent submitted that RW1 on cross examination, admitted that the Respondent herein had worked for the Appellant since 2013 up to 2017, inclusive of both years and that as such, she was entitled to severance pay.
38. On the third issue, the Respondent submitted that she was entitled to further compensation for remainder of work life, notwithstanding that the Respondent was 38 years old, and could have expected



to work for a further 22 years before retirement. It was the Respondent's submission that the learned Magistrate applied his considered discretion to award the Respondent pay for 15 years.

39. On the issue whether the Respondent was properly awarded payment for overtime, the Respondent submitted that the Daily Attendance Register forming part of the Appellant's document shows that the Respondent worked at least 11 hours every day. It is therefore the Respondent's submission that the trial court's determination on overtime was well grounded in law and the facts.
40. As regards the fifth and sixth issues for determination, the Respondent submits that the contract presented by the Appellant lacks provisions for remuneration and therefore cannot be considered an employment contract and cannot have any impact whatsoever on the determination of the court. It is also the Respondent's submission that the importance of insurance against personal injury or rather the refusal to subject oneself to it, is no justification for unfair termination.
41. Lastly, on the issues of costs, the Respondent has submitted that the Appellant has not proved its case and urged the court to dismiss the Appeal with costs to the Respondent.

### **Determination**

42. Upon analyzing the Memorandum of Appeal, the Record of Appeal and the rival submissions of the parties herein. The eleven grounds of appeal can be crystallized into ground 2 of the Memorandum of Appeal. The issues that fall for my determination is therefore:
  - i. Whether the Trial Court erred in finding that the Respondent was unfairly terminated
  - ii. Whether the Trial Court erred in awarding the Respondent the reliefs granted.
43. A fair termination implies that an employer complied with the strict requirements of Sections 41, 43, 45 and 47(5) of the *Employment Act*, in respect of procedure and the validity and fairness of reasons for termination.
44. The Respondent in her submissions contended that she was constructively dismissed by the Respondent after she refused to sign the new employment contract.
45. In the case of *Kenya Union of Sugarcane Plantation and Allied Workers v Othira (Appeal E005 of 2023)* [2024] KEELRC 843 (KLR), the court observed as follows with regards to constructive dismissal: -

“The first element that must be present for constructive dismissal to be construed, is that the employee has to have resigned from the service of the employer, and the resignation must be by reason of the employer creating working conditions that leave the employee with no option but to resign.”
46. In the instant case, the facts and circumstances do not fit into the definition of constructive dismissal. On this basis, the Claimant's argument that she was constructively dismissed is not tenable.
47. On its part, the Appellant alleged that the Respondent absconded duty after her refusal to sign the new employment contract. Under Section 44(4) (a) of the *Employment Act*, absconding duty by an employee constitutes gross misconduct and renders an employee liable for summary dismissal.
48. The Appellant apart from alleging that the Respondent absconded duty, did not demonstrate that it complied with Section 41 of the *Employment Act* after the Respondent allegedly failed to report on duty.
49. RW1, in his evidence before the trial court admitted that he instructed the guards not to allow employees who had not signed the new employment contracts into the Respondent's premises.



50. From the above analysis, the Appellant failed to prove, on a balance of probability, the allegation that the Respondent absconded duty. In view of the RW1's admission that he instructed the guards not to allow any employee who had refused to sign the new contract, and in particular the Respondent herein, I find that the Respondent's employment was unlawfully and unfairly terminated by the Appellant.

For these reasons, I uphold the trial court's finding that the Respondent's employment was unfairly terminated by the Appellant.

51. On the awards made by the trial Court, this court as an appellate court can only interfere with such discretion if there was an error on some matters leading to erroneous decision as was held as follows in the case of Kenya Revenue Authority & 2 others v Darasa Investments Limited (2018) eKLR:

“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. The Respondent was awarded the following reliefs which I will address in the separate heads as hereunder:

i. One month's pay in lieu of notice

Having found the Respondent was unfairly terminated from employment the award of Kshs. 8500 on account of 1 month's salary in lieu of notice is found merited and the award of the Trial Court is upheld.

ii. Severance pay

Under section 40(1)(g) of the *Employment Act*, 2007, only employees separating with an employer on account of redundancy are entitled to severance pay. On this ground, the award of severance pay is hereby set aside.

iii. Compensation for unfair termination

The trial court awarded the Respondent 12 months compensation for unfair termination. In her testimony, the Respondent stated that she had worked for the Appellant for five years as at the time she left employment. She also stated that the reason for termination of her employment was her refusal to sign employment contract. A contract is a requirement of the law under section 9 of the *Employment Act* which provides that every contract for a period exceeding 3 months must be in writing and it is the responsibility of the employer to ensure that the contract is signed by the employee.

The Respondent did not state the particulars of the contract that were unfavourable to her that made her decline to sign the same. It is unfortunate that neither of the parties filed a copy of the said contract.

Be that as it may, the refusal of the Claimant to sign the contract was a valid reason for termination of her employment. The only reason the termination was unfair was because of want of fair procedure, the Appellant having locked out the Respondent.

It is my view that in the circumstances, considering duration of employment and reasons for termination, compensation equivalent to 2 months' salary is reasonable. The trial court's award under this head is set aside and substituted with 2 months' salary as compensation.

iv. Monthly salary for the month of August 2018



The Respondent did not tender any evidence that she was not paid salary for the month of August 2018. She did not even state the exact date her contract was allegedly terminated. The award by the trial court under this head is set aside.

v. Leave due for the period worked

RW1 in his evidence admitted that the Respondent never proceeded on leave. The number of leave days per annum as provided in section 28 of the *Employment Act* is 21 days per year. The award of the trial court was based on 30 days. 5 years leave at 21 days is 105 days at Kshs.326.92 per day. I set aside the award of the trial court and substitute therewith an award of Kshs.34,326.90 as pay in lieu of leave due but not taken.

vi. Overtime

The Appellant did not controvert the Claimant's testimony that she worked from 7.00 am to 6.00 pm every day from Monday to Saturday. She therefore worked 11 hours a day for 6 days a week adding up to 264 hours a month instead of a maximum of 225 hours a month as provided in the Regulation of Wages and Conditions of Employment (General) Order. She is therefore entitled to 39 hours a month for 60 months at the rate of 1.5 times the hourly rate being Kshs. 35.42. I award her Kshs 82,882.80 as overtime. The award of Kshs. 219,160 is set aside and substituted with the award of Kshs. 124,324.20.

vii. Payment for the remaining years

The *Employment Act* only provides for compensation for unfair termination to a maximum of 12 months. There is no legal basis for an award of the remaining years in service and therefore, the award by the trial court under this head is unfounded. The same is set aside

53. In the upshot the Appeal partially succeeds as follows.

- a. The award of one months' pay in lieu of notice is upheld at Kshs. 8,500
- b. The award of severance pay is set aside
- c. The award of 12 months' salary compensation for unfair termination is substituted with 3 months' salary as compensation at Kshs 25,500
- d. The award of salary for August 2018 is set aside
- e. The award on leave days not taken is substituted with Kshs. 34,326.90
- f. The award of overtime is substituted with Kshs 124,324.20
- g. The award of payment for the remaining years is set aside

54. As the appeal has partially succeeded, each party shall bear its costs of the appeal. The award of costs in the lower court is sustained.

**DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 7<sup>TH</sup> DAY OF NOVEMBER, 2024**

**MAUREEN ONYANGO**

**JUDGE**

