



**Muravvelj Holdings Limited v Mwadzoya (Appeal E063 of 2024)
[2024] KEELRC 2737 (KLR) (7 November 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2737 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E063 OF 2024
M MBARÚ, J
NOVEMBER 7, 2024**

BETWEEN

MURAVVELJ HOLDINGS LIMITED APPELLANT

AND

RASHID JUMA MWADZOYA RESPONDENT

*(Being appeal from the judgment of Hon. Kyambia delivered
on 3 September 2021 in Mombasa CMELRC No. 318 of 2018)*

JUDGMENT

1. The appeal arises from the judgement delivered on 3 September 2021 in Mombasa CM ELRC No. 318 of 2018. The appellant is seeking the judgment to be set aside with costs.
2. The background to the appeal is a claim filed by the respondent, Rashid Juma Mwadzoya, who was employed by the appellant as an assistant caretaker/plumber on 10 October 2017 at a wage of Ksh.18 000 per month. He worked until 9 July 2018, when his employment was terminated. He claimed that he had signed a contract from 10 October 2017 to 31 October 2019 for work from 8 am to 5 pm for 6 days each week.
3. The respondent claimed that on 9 July 2018, he went to Raza Maravvej, the administration and financial director, to request fare to go and work at the director's home. Instead, Raza called Barack Deya, the supervisor, to inspect the office washrooms where the respondent was working. Raza directed the respondent to remove his work uniform and go home, which led to the termination of employment without good cause or justification and contrary to the law. He claimed the following dues;
 1. one-month notice Ksh.18,000;
 2. 15 days leave Ksh.10,385;
 3. House allowance for 10 months Ksh.27,000;



4. Unexpired contract term of 16 months Ksh.288,000;
 5. 12 months compensation Ksh.216,000;
 6. Costs of the suit.
4. In response, the appellant admitted that the respondent signed a contract to commence from 10 October 2017 to 31st October 2019. He was to work for 48 hours a week. Raza did not tell the respondent that he was not impressed with his work and that he should remove the office uniform and go home as alleged. There was no breach of the law and the claims made are not justified.
 5. The trial court heard the parties and, in the judgment delivered on 3 September 2021, held that termination of employment was unfair and awarded the claimant the following:
 1. Notice pay Ksh.18,000;
 2. Leave pay for 6 months Ksh.10,385;
 3. 12 months compensation Ksh.216,000;
 4. Certificate of service;
 5. Costs and interests.
 6. Aggrieved by the judgment, the appeal is that the award of one-month notice pay was in error, and the trial court failed to appreciate that there was no termination of employment as alleged. The appellant is still willing to take the respondent back to work since the allegations of dismissal from employment were incorrect. The trial court failed to note that the respondent failed to attend the scheduled disciplinary hearing; hence, the award of costs was not justified.
 7. Both parties attended and agreed to address the appeal through written submissions.
 8. The appellant submitted that the respondent was issued a show cause letter, which he declined to sign and which evidence aligns with the Statement of the Appellant's Secretary. The Minutes regarding the disciplinary hearing demonstrate that the appellant could not hold the disciplinary meeting due to the respondent's absence. There was no termination of employment as alleged, and efforts to call the respondent were futile as the respondent did not report to work. On cross-examination, the respondent admitted he absconded from work, failed to attend the disciplinary hearing, and efforts to reach him were futile.

The appellant was still willing to have the Respondent resume work. This evidence was not taken into account by the trial court. The award for unfair termination was in error and instead, the respondent should have been allowed to resume the employment relationship.
 10. The burden of proving termination rested on the respondent, and the burden never shifted to the appellant, who at all times pleaded and testified that it never terminated the respondent as held in *Peninnah Kathikwa Mwendwa v Re-Suns Spices Limited* [2018] eKLR.
 11. The appellant submitted that notice pay and compensation for unfair termination should not have been awarded because the respondent absconded from duty.
 12. In the Supplementary submissions, the appellant also submitted that the submissions by the respondent that the appeal is incompetent are incorrect. The Memorandum of Appeal dated 15 April 2024 was filed on 17 April 2024, the position of which can be confirmed from the online filing portal. The Appellant's Advocate on record believed that all the pleadings had been filed, particularly



considering that the Record of Appeal was ready as the pleadings making up the Record of Appeal had been filed vide proceedings in Appeal No. E108 of 2023 was dismissed for being filed without leave of the Court. The mistake of uploading only the Memorandum of Appeal as opposed to the entire Record of Appeal, dated 17 April 2024, was a clerical error that ought not to be visited upon the appellant.

13. The respondent submitted that the award of notice pay was correct and justified based on evidence of an unfair termination of employment. The appellant did not notify the respondent of his impending termination.
14. The trial court considered the pleading, evidence and written submissions filed by the parties. Under Section 43 of the *Employment Act*, an employer who fails to justify the reasons leading to termination of employment is unfair, and compensation is due. There is no record that the appellant was willing to return the respondent to work. No communication was issued to this effect. The evidence that the respondent was of poor work performance was without proof, and termination of employment was not based on any notice or justification.
15. The respondent submitted that in the case of *William Onyango Rubia v Hatari Security Guard Limited* [2018] eKLR, the Court held that where a response consists of mere denials and the employer fails to support its assertions with evidence, the claim stands unchallenged. The appellant called its witness, who confirmed that the employment relationship had ceased. The alleged desertion was not addressed in *James Ashiemi Namayi v Menengai Oil Refineries Ltd* [2016] eKLR.
16. The respondent submitted that the appeal was incompetent. The trial court's judgement was delivered on 3 September 2021, and the appellant filed Misc. Application E060 of 2021 seeks leave to file an appeal out of time, which was allowed on 28 April 2022. The appellant was given 30 days to file an appeal. There was no compliance.
17. The appellant filed Misc. Application E108 of 2023 sought to file an appeal, and on 6 June 2024, the Court dismissed the application.
18. The appellant filed Misc. Application E015 of 2024. On 11 April 2024, the Court granted 14 days to file a Record of Appeal, but the same was filed out of time. Time lapsed on 25 April 2024, but the appeal was only filed out of time on 7 May 2024. This renders the appeal incompetent and should be dismissed with costs.

Determination

19. This is a first appeal. The Court must review the entire record, re-assess and conclude.
20. The respondent's last issue in the written submissions is that the appeal is incompetent.
21. Through Misc. Application E015 of 2024, the Court allowed the appellant to file an appeal out of time. The ruling was issued on 11 April 2024 on the condition that;
 - a. Leave is granted to the applicant to file an appeal out of time against judgment delivered in Mombasa CMELRC No.318 of 2021;
 - b. The applicant is to file and serve the Memorandum of Appeal together with the Record of Appeal within 14 days;
 - c. Judgment and decree in (a) above is hereby stayed;
 - d. In default (b) above, the orders herein shall lapse;



- e. The applicant is to pay Ksh.20,000 to the respondent in costs.
22. The 14 days allowed lapsed on 2 May 2024, when Order 50 Rule 1 of the Civil Procedure Rules was applied.
23. The Memorandum of Appeal was filed on 17 April 2017, and the Record of Appeal was filed on 13 June 2024, indicating the appeal related to the judgment delivered on 3 September 2022 in ELRC No. 318 of 2022.
24. The appellant submitted that the lapse in filing the Record of Appeal in time arose out of an error by counsel, which should not be visited upon the client. The Record of Appeal had been filed in Misc. Application E108 of 2023, which was dismissed.
25. The appellant, hence, appreciates the indulgence granted by the court over time to file its appeal. Indeed, as submitted by the respondent, several applications have been addressed, allowing the appellant time to file its appeal;
- ELRC Misc. Application E060 of 2021 allowed 30 days to file the appeal within 30 days;
- ELRC Misc. Application E108 of 2023 dismissed the application; and
- ELRC Misc. Application E015 of 2024 allowed 14 days to file the appeal on the stated conditions.
26. Filing an appeal is a matter regulated in law. Under Section 17 of the *Employment and Labour Relations Court Act*, an aggrieved party should file an appeal within 30 days of the judgment. Under Rule 12 of the Employment and Labour Relations Court (Procedure) Rules, 2024, the motions thereof require an appellant to file the appeal within 30 days together with the record of appeal and, where this is not filed, to seek time extension and, upon the given conditions, to do as directed.
27. In this case, the appellant did not comply with the set conditions on 11 April 2024.
28. The appeal is rendered incompetent. It cannot stand. The alleged mistake of counsel cannot sanitize the lapse.
29. The appeal is without foundation.
30. Delving into the issues raised in the appeal would be academic, as the appeal is incompetent.
31. The appeal is hereby dismissed with costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA ON THIS 7TH DAY OF NOVEMBER 2024.

M. MBARŪ

JUDGE

