



**ISL Kenya Limited v Mutua & another (Appeal E003 of 2021)
[2024] KEELRC 13485 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13485 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
APPEAL E003 OF 2021
B ONGAYA, J
DECEMBER 19, 2024**

BETWEEN

ISL KENYA LIMITED APPELLANT

AND

MUTINDA MUTUA 1ST RESPONDENT

JAMES NDAISI MUTUA 2ND RESPONDENT

*(Being an appeal against the judgment and decree of the Honourable Bernard
Kasavuli PM delivered in Mavoko ELRC No. 30 of 2018 on 18.02.2021)*

JUDGMENT

1. The learned trial Principal Magistrate delivered the judgment in the suit before the trial Court in favour of the 2nd respondent and against the appellant for:
 - a. The 1st claimant's claim is dismissed with no order as to costs.
 - b. A declaration that the dismissal of the 2nd claimant from employment was unlawful and unfair and that he is entitled to payment of his terminal dues and compensatory damages.
 - c. An order for payment of the 2nd claimant's terminal dues and damages totalling Kshs 276,060/=.
 - d. Costs and interest.
 - e. The respondent to issue the claimants with certificate of service.
2. The appellant filed the memorandum of appeal on 16.03.2021 through John Mburu & Company Advocates. The appellant stated that the trial Court erred in law and fact and misdirected itself as follows:



- a. By failing to acknowledge and appreciate that, the 2nd respondent's employment was terminated by consent of both the appellant and the 2nd respondent on 05.04.2017.
 - b. By failing to hold that as at 28.04.2017 the purported date of dismissal, the 2nd respondent had ceased to be an employee of the appellant having mutually agreed to terminate his employment on 05.04.2017.
 - c. By failing to appreciate and hold that upon receipt of Kshs 10,000/= only paid on 05.04.2017 the 2nd respondent had received his terminal dues as agreed between the appellant and the 2nd respondent and the 2nd respondent could not renege against the agreement reached between the appellant and the 2nd respondent.
 - d. By holding, that the appellant was required to pay service pay to the 2nd respondent yet the said 2nd respondent used to attend work when production materials were available.
 - e. By holding that the appellant was required to pay the 2nd respondents service pay yet the appellant led evidence it had been remitting NSSF and NHIF contributions as required by law.
 - f. By failing to consider the appellant's amended response to the memorandum of claim dated 25.08.2020 and submissions dated 09.12.2020.
 - g. By referring to other cases, which were not cited to the detriment of the appellant.
 - h. By awarding the respondent maximum general damages for abrupt loss of income of Kshs 201,240/= without justification thereof.
 - i. By holding that the 1st and 2nd respondents were entitled to a certificate of service yet he had held that the 1st respondent had failed to prove that he had been terminated unfairly or unlawfully.
3. The appellant prayed for orders:
- a. That this appeal be allowed
 - b. The part of the judgment and decree issued by the Honourable Bernard Kasavuli on Mavoko ELRC Cause No. 30 of 2019 Mutinda Mutua and another vs. ISL Kenya limited on 18.02.2021 be set aside.
 - c. Dismiss the respondent's memorandum of claim in Mavoko ELR Cause No. 30 of 2019.
 - d. The respondents be directed to pay the costs of the appeal and Mavoko ELRC Cause No 30 of 2019.
4. The appellant filed submissions on the appeal. No submissions were filed for the 2nd respondent. Despite service, the respondents did not attend the mentions for directions.
 5. The 2nd respondent had filed the memorandum of claim on 22.02.2019. His case was as follows.
 6. On 06.12.2010 he was employed by the appellant as a machine attendant or tongman. He worked six days in a week from 7:00am to 7:00pm, which are eight working hours and four overtime work hours.
 7. He was paid at the end of every week Kshs 5,869.50/= as weekly earnings. Monthly the gross salary would amount to Kshs 25,434.50/=.
 8. On 28.04.2017, the appellant summarily terminated the respondent's employment. It was the respondent's case that he was not given any notice of dismissal or one-month salary payment in lieu of notice.



9. He pleaded that he was not given a hearing or an opportunity to appeal the decision by the respondent to terminate his employment.
10. That no reason for termination was given to him by the appellant.
11. The respondent stated that the appellant did not issue him with a written employment contract during the whole period of his employment and intermittently contribute towards his national hospital security fund.
12. The period 02.07.2012 and December 2014 the appellant temporarily stopped him from working stating that there was no raw material and later on 05.01.2015 recalled him to resume work at its factory in Athi River.
13. It was the 2nd respondent's case that the appellant failed to pay him his terminal dues and issue him with a certificate of service.
14. The appellant filed an amended response to memorandum of claim dated 25.08.2020.
15. The appellant's case was that it employed the 2nd respondent as tongsmen in its factory, and his employment was on a casual basis and was required to attend work when the company had enough raw materials for production processes.
16. The respondent's daily wage was Kshs 559/= and which sum would be paid weekly. The amount payable weekly depended on the number of days which the respondent attended work on the particular week.
17. It is the appellant's case that it did not dismiss the respondent from employment on 28.04.2017 as no employee attended work on the said day. The appellant had previously shut down its operations on 05.04.2017 because of the lack of raw materials and the imposition of the ban on the use of twisted bars for reinforcement of concrete in favour of ribbed bars.
18. That on 28.04.2017 the respondent had already ceased being an employee of the appellant as his services had been terminated by mutual consent of the parties on 05.04.2017 and he was paid Kshs 10,000/= which sums she acknowledge receipt of.
19. That the Kshs. 10,000 was paid in full and final settlement of the dues owing to the respondent.
20. It was the appellant's case that it did not dismiss the respondent on 28.04.2017 as the appellant had already shut down its operations.
21. That the appellant used to faithfully remit all NSSF and NHIF contributions as required by law.
22. The appellant maintained that the respondent had no cause of action against the appellant as he had been terminated and adequately compensated on 05.04.2017.
23. This is a first appeal and the role of the Court is to reevaluate the evidence and arrive at conclusions one way or the other bearing in mind it did not by itself take the evidence. The decision of the trial Court ought not be disturbed unless shown that the trial Court misdirected itself and thereby arrived at conclusions that were not just or correct.
24. The Court has considered the material on record and returns that the appeal must succeed upon the grounds of appeal as urged for the appellant. In particular, the Court returns as follows:
 - a. Both 1st and 2nd respondents testified that they were daily rate employees at Kshs.559.00 per day paid on weekly basis at Kshs. 2395.00. By that testimony and which was consistent with



the respondent's case and evidence by way of payment records signed by the respondents, the trial Court erred in failing to find that the respondents were casual employees - who worked as they wished and upon need when the appellant had raw material to be used in the appellant's factory manufacturing enterprise.

- b. The appellant exhibited undisputed records which showed that the plant closed. The 2nd respondent disputed that the record of the meeting at which it was agreed that workers be paid Kshs.10, 000.00 in full and final settlement as the factory closed was binding upon him. He denied giving such authority. However, he did not deny that he had signed and received the Kshs.10, 000.00. He lamented that he did not understand how the figure was arrived at. However, he gave no particulars on how he may have been prejudiced and he offered no computation of what he thought would have been a fair separation package. The Court finds that the 2nd respondent being a casual worker, the appellant had been generous and gratuitous in paying the Kshs.10,000.00 in final dues.
- c. The claimant having confirmed that he was a daily wage rated employee, the issue of unfair termination did not arise. Further, there was no basis for the trial Court to disregard the established evidence by the appellant that parties had agreed to separate by the appellant paying the agreed Kshs. 10,000.00.
- d. In the circumstances, there was no justification for the trial Court to grant the reliefs as was awarded.
- e. Thus, the appeal will succeed with costs. The award of a certificate of service is not challenged and the appellant and the 2nd respondent each to bear own costs of the suit in the trial court.

In conclusion, the appeal is hereby allowed with orders as follows:

1. The trial Court's orders in favour of the 2nd respondent for a declaration that the dismissal was unfair and unlawful and he is entitled to compensation; and, payment of Kshs.276, 060.00 plus costs and interest, are hereby set aside.
2. The appellant and the 2nd respondent each to bear own costs of the in suit before the trial Court.
3. The 2nd respondent to pay the appellant's costs of the appeal.
4. The Deputy Registrar to return the case file Machakos Sub-registry forthwith.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS THURSDAY 19TH DECEMBER 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

