



**Enterprises & 2 others v Azei (Appeal E033 of 2024)
[2024] KEELRC 13561 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13561 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
APPEAL E033 OF 2024
M MBARŪ, J
DECEMBER 18, 2024**

BETWEEN

BIG ROAD ENTERPRISES 1ST APPELLANT

MUSTAFA ABDIKADIR HASSAN 2ND APPELLANT

MARYAM SWALEH HIFITHI 3RD APPELLANT

AND

JUMA AZEI RESPONDENT

*(Being an appeal from the judgment of Hon, M. Nabibya delivered
on 22 February 2024 in Mombasa CMELRC No.E681 of 2021)*

JUDGMENT

- 1 The appeal arise from the judgment delivered on 22 February 2024 in Mombasa CMELRC E681 of 2021. The appellants seek the judgment set aside and the respondent’s claim dismissed with costs.
- 2 The respondent herein filed a Memorandum of Claim before the lower court because he was employed by the appellants as a truck driver on 17 April 2017 at a basic wage of Ksh 20,000 per month. On 12 April 2021, he reported to work and was summoned by the 2nd appellant general manager and verbally informed that his services were no longer required and his contract had been terminated. He was not given reasons for such action or paid his terminal dues. He claimed he had been underpaid contrary to the Regulation of Wages (General) (Amendment) Order, where he was supposed to be paid Ksh.30,627.45. There was no payment of a house allowance or remittance of statutory dues to NHIF and NSSF. He made the following claims;
 - a. Notice pay Ksh.20,000;
 - b. Unpaid salary for April 2021 Ksh.8,000;



- c. Unpaid salary under minimum wage for 48 months Ksh.510,117.60;
 - d. 84 leave days for 4 years Ksh.98,950.22;
 - e. Unpaid house allowances for 48 months Ksh.220,517.64;
 - f. Service pay Ksh.70,678.73;
 - g. Unremitted NHIF Ksh.36,000;
 - h. Unremitted NSSF Ksh.19,200;
 - i. 12 months compensation Ksh.367,529.40;
 - j. Certificate of service;
 - k. Costs.
- 3 In response, the appellants admitted that the respondent was employed as a truck driver at a wage of Ksh: 20, 000 per month. Employment was from 3 January 2019 and not 17 April 2017, as alleged. The respondent, without leave or notice, deserted employment on 7 March 2020 after he arrived at the 1st respondent's premises in Mombasa yard. He left without a trace. The administrators tried looking for him unsuccessfully, and a notice to show cause was issued on 13 March 2020. Musa Wanjala delivered the letter to the respondent, but the respondent refused to sign a copy. There was no termination of employment but desertion of duty on 7 March 2020. Apart from payment of wages, the appellant paid the respondent Ksh.10, 000 for mileage allowance for every trip he made. After the respondent failed to report to work after 29 July 2019 and through a letter dated 9 August 2019, they informed the Labour office that he had absconded duty.
- 4 The appellants also stated they would close the office in December and allow all employees to take annual leave. The paid wages were consolidated, inclusive of the house allowance. All statutory dues were remitted to NSSF and NHIF, and the claims made are not justified.
- 5 The appellants filed various work records.
- 6 In the judgment of the trial court, the learned magistrate held that there was an unfair termination of employment and awarded the following;
1. 12 months compensation;
 2. Notice pay;
 3. Service pay for 4 years;
 4. House allowance;
 5. Certificate of service;
 6. Costs and interests.
- 7 Aggrieved by the judgment, the appellants filed the appeal on 18 grounds. The appeal is that the trial magistrate erred in law and fact by allowing the claim without considering the evidence presented before it, mainly that employment commenced on 3 January 2019 and not 17 April 2017 as alleged. Despite the appellants producing various written contracts, the court held continuous employment from 2017 to 2021. The respondent admitted in evidence that he was employed under a written contract.



- 8 Other grounds of appeal are that the trial court failed to find that the respondent had the burden of proof that he was employed beyond 7 March 2020 and, hence, the finding that employment was terminated in April 2021 was in error. The tabulation of terminal dues was in error based on the date of employment and employment termination.
- 9 The trial court failed to find that there was no termination of employment but desertion of duty. The award for notice pay and 12 months' compensation was not justified. The finding that the respondent only took 7 days of annual leave was not supported by any evidence, whereas the appellants produced evidence that the respondent had 117 paid days while at home, which more than the 21 leave days is allowed under the law.
- 10 The payment for alleged days worked in April 2021 was in error. There was no work beyond 7 March 2020. A consolidated wage was paid, and the award of a house allowance was not justified. Despite payment of statutory dues, the trial court awarded service pay. The appeal should be allowed with costs.
- 11 Both parties attended and agreed to address the appeal through written submissions.
- 12 The appellants submitted that there was a contract of employment from 3 January 2019 and not 17 April 2017, as alleged. Based on the contract, the respondent was employed as a truck driver at a consolidated wage of Ksh.20, 000 per month and given Ksh.10, 000 mileage allowances whenever on duty. The respondent admitted to his contract of employment and the terms and conditions thereof.
- 13 The respondent produced KRA port pass forms from 2017 as proof of his employment, but the employment contract is the correct record upon which to rely. In the case of Hassan t/a Big Road Enterprises v Juma Appeal E009 of 2022, the court was presented with multiple employment contracts and had to decide when employment commenced and held that under Section 90 of the [Employment Act](#), the court can only go back to 3 years because the employer is allowed to convert casual employment into written contract terms.
- 14 In this case, the appellants employed the respondent on 3 January 2019 and issued him a written contract. Employment terminated on 7 March 2020 through desertion of duty. In the case of Joseph Munene Murage v Salome Ndungu [2019] eKLR, the court held that the jurisdiction of the court is restricted to the existence of an employment relationship.
- 15 The appellants submitted that upon desertion of duty, under Section 44(4) of the [Employment Act](#), they were allowed to dismiss the respondent. In the case of Julius Kyalo Malonza v Ruth Osolo t/an Eraeva Catering Services [2021] eKLR, the court held that upon desertion of duty, employment was deemed terminated. An employer cannot deem an employee to have deserted duty while he is still at work.
- 16 The award of terminal dues was not justified as the basis of the claim was not proved. The assessment was flawed and based on material errors, so it should be set aside.
- 17 The respondent submitted that he was employed as a heavy commercial driver on 17 April 2017 and not on 3 January 2019, as alleged by the appellants. He worked until 12 April 2021, when his employment was verbally terminated without notice or payment of terminal dues. The records of employment and port passes issued in 2017 were not challenged. In evidence, the appellant's witness admitted that they started issuing written contracts in 2019. This confirms that employment started before 3 January 2019.
- 18 It is not applicable in the case of Hassan t/a Big Road Enterprises v Juma ELRCA E009 of 2022. The case related to multiple contracts and causal employment. In this case, employment commenced verbally in 2017.



- 19 The respondent submitted that there was an unfair termination of employment and not desertion of duty. The case in which the respondent announced duty on 7 March 2020 is without proof. The respondent produced a delivery note dated 24 February 2020 and delivered goods to Uganda on 3 March 2020. During Covid, the respondent would take about 21 days on a trip. He cannot have been back on 7 March 2020. The respondent did not sign the alleged notice to show cause dated 13 March 2020, nor was it sent through his phone. The allegations that Musa delivered it in Voi are not correct, and he was not called and was alleged to have died during COVID-19. No evidence was produced in this regard. In the case of *Javan Kisoi Mulwa v SAA Interstate Traders (K) Limited* [2018] eKLR, an employer who terminates employment on the grounds of abscondment has to demonstrate there was no intention of resuming duty. In this case, the appellants have no proof of desertion of duty.
- 20 The respondent submitted that the learned magistrate's findings that there was an unfair termination of employment are correct and should be confirmed with the dismissal of the appeal. The awards made are justified and lawful.

Determination

- 21 This is a first appeal. The court's mandate is to review, re-assess and make its conclusions. However, consider that the trial court had a chance to hear the witnesses.
- 22 The respondent's case was that his employment commenced on 17 April 2017 but was terminated on 12 April 2021 by Ismail Abdukadir Hassan, the general manager. The appellants, on their part, assert that employment was through a written contract commencing on 3 January 2019 until 7 March 2020, when the respondent deserted duty.
- 23 The date of employment is contested. The respondent's case was that his employment commenced on 17 April 2017, while the appellants' case was that employment commenced on 3 January 2019.
- 24 There is a written contract of employment. Under Section 10 (3) of the *Employment Act*, the employer has the legal duty to issue an employment contract.
- 25 The appellants produced a contract dated 3 January 2019.
- 26 The respondent did not contest this contract. Indeed, he admitted in evidence that he was under a written contract. He had been working for the appellants before the issuance of the written contract, going back to 2017.
- 27 However, a written contract is lawful and legitimate. An employer is allowed to convert a verbal contract into a written contract. Under a written contract, the terms of employment are clarified, and upon it, the court is guided by the nature of the employment relationship.
- 28 In this case, the employment relationship was regulated from the written contract dated 3 January 2019. Any claims dated before the written contract are bound under the limitations under Section 90 of the *Employment Act*.
- 29 The trial court ignored these facts in addressing the tenure of service and relied on the claim that employment was commenced on 17 April 2017, but this should have been in accordance with the written contract on 3 January 2019.
- 30 The respondent argued that his employment was verbally terminated on 12 April 2021, while the appellants asserted that he absconded from duty on 7 March 2020.



- 31 The respondent challenged the notice to show cause dated 13 March 2020. It was alleged to have been served by Juma at Voi, but Juma was not called as a witness because he was alleged to have died during covid.
- 32 The appellants filed a letter and notice to the Labour Office dated 20 March 2020. This indicates that the respondents had not been seen since 7 March 2020.
- 33 Whereas an employee who fails to attend work or absents himself from duty commits gross misconduct subject to summary dismissal, the employer who wishes to rely on such matter must demonstrate to the court the efforts taken to reach out to the employee noted as absent from duty without good cause. In *Godfrey Anjere v Unique Supplier limited* [2015] eKLR, thus;
- In a dismissal on account of absconding duties, the employer must show what steps it took to inform the employee that his or her dismissal would result if they did not report back to work. This is necessary to avoid any injustice to an employee who may be away from work for a lawful or reasonable excuse, such as illness or circumstances beyond their control, and yet unable to communicate to the employer in good time.
- 34 Where the employee deserts duty, which is gross misconduct, the employer must complete the circuit. Summon the employee to address such gross misconduct in accordance with Sections 44 and 41(2) of the *Employment Act*, and where the employee fails to attend, ensure closure of employment by issuing a termination notice. The notice to the Labour Officer is upon termination of employment.
- 35 The basis for Section 18(5) (b) is upon termination of employment. Without such closure, the employee is still deemed available to resume his duties;
- (5) Upon the termination of a contract of service—
- (a) ...
- (b) by dismissal, the employer shall, within seven days, deliver to a labour officer in the district in which the employee was working a written report specifying the circumstances leading to, and the reasons for, the dismissal and stating the period of notice and the amount of wages in lieu thereof to which the employee would, but for the dismissal, have been entitled, and the report shall specify the amount of any wages and other allowance earned by him since the date of the employee's dismissal.
- 36 The appellants' notice to the Labour Office dated 20 March 2020 does not conform to these provisions of Section 18(5) (b) of the *Employment Act*. The notice did not relate to the termination of employment but a report of desertion. It did not give the circumstances under which he was deemed to have deserted duty and the reasons justifying termination of employment by summary dismissal.
- 37 The respondent produced records that he was on a journey to Uganda. He made deliveries on 24 February 2020. Indeed, this was at the onset of the pandemic, and even though borders had not closed, the context of the notice to show cause dated 13 March 2020 and the letter to the labour office on 20 March 2020 is lost. A crucial link was Musa, who was alleged to have served the respondent with the notice to show cause at Voi.
- 38 The challenge by the respondent then stands true. If this witness died during the Covid period, a certificate of death would have easily exonerated the appellants.



- 39 Ultimately, without the notice terminating employment, the evidence by the respondent that his employment was verbally terminated by the general manager on 12 April 2021 is correct.
- 40 On the remedies sought, without proof or issuance of a notice terminating employment, the terms must apply to the benefit of the respondent. Failure to adhere to the mandatory provisions of Section 44 or 41 of the *Employment Act* resulted in unfair termination of employment, and notice pay and compensation were justified.
- 41 In tabulating the remedies sought, the respondent claimed he was employed as a heavy commercial truck driver and hence was underpaid at Ksh. 20 000 instead of Ksh.30, 627.45. However, he claimed notice pay at Ksh. 20 000 and compensation at the same rate of Ksh.20 000 wage per month.
- 42 Under the contract dated 3 January 2019, the position is a truck driver, not a heavy commercial driver. However, on the records filed by the appellants, pages 39, 40, 41, 42 and 43 of the Record of Appeal all address the nature of the vehicle the respondent was driving. This was a heavy commercial driving. Page 43 of the Record of Appeal is most certain of this fact.

The wage paid is;

Salary

You will be eligible to draw a salary of Ksh.20, 000 per month plus all allowances and overtime payable in arrears at the end of every calendar month.

The wage paid was not consolidated.

Under the Wage Orders, a heavy commercial driver working in Mombasa in January 2019 earned Ksh. 30, 627.45 per month as a basic wage.

An employee cannot consent to an underpayment. Whether there was a written contract or not, the basis should have been the minimum wage under the Minister's published Wage orders. Parties can go above the minimum but not below.

On the wage due at Ksh.30, 627.45 the respondent was entitled to a 15% house allowance of Ksh.4, 594.05 total gross of Ksh.35, 221.05 per month. The underpayment was Ksh.15, 221.05 from January 2019 to 12 April 2021 for 27 months, and the total underpayment is Ksh.410, 968.35

On this basis, the notice pay due is Ksh. 35, 221.05, as required under Sections 35 and 49(2) of the *Employment Act*.

For the wage due in April 2021 for 12 days, on the total wage due for days worked, the respondent is entitled to Ksh.14, 088.40

- 43 On annual leave, the appellant submitted work records and the respondent's scheduled days off. Under Section 28 of the *Employment Act*, the respondent was entitled to 21 leave days. The schedule filed by the respondent has a total of 117 days, over and above the legal minimum.
- 44 Service pay is due under Section 35(5) and (6) of the *Employment Act*, where the employee is not on a pension schedule or medical cover. The appellants filed payment statements with a net pay of Ksh.20, 000 only. The payment statement required under Section 20 of the *Employment Act* should give the payment particulars, including the statutory remittances.
- 45 The employment contract does not confer any social security or medical cover benefits. Para 20 of the Amended Statement of Response filed by the appellants before the trial court on the basis that NHIF was remitted is left bare. No records can be discerned in adherence to Sections 20 and 35 or any part thereof that there were statutory dues remittances.



- 46 Service pay is due at 15 days for every full year worked. From January 2019 to April 2021, there are two complete years, and based on the last due gross wage of Ksh.35, 221.05 the total due is Ksh. 35,221.05
- 47 This is addressed on the claim for unremitted NHIF and NSSF dues and the claim for service pay.
- 48 On the award of compensation, the learned magistrate gave the reasons for the maximum award and justification and that the respondent was aged and not likely to get another job. However, the basis for the maximum award should be premised on principles of the law and the discretion upon the court to award up to the maximum allowed compensation be applied judicially as held in Kenfreight (E.A) Limited v Benson K. Nguti [2016] KECA 409 (KLR) and in the case of National Bank of Kenya v Samuel Nguru Mutonya [2019] KECA 404 (KLR).
- 49 In this case, the respondent had served the appellants for under 3 years in his written employment contract. Even though his employment was terminated unfairly, the award of notice, terminal dues and underpayments taken into account to award the maximum compensation due on the basis that he is not eligible to secure new employment was not based on any evidence. The respondent did not make any submissions that he has tried to secure new employment and failed to do so due to his age. The assumption that he is old and, therefore, cannot get new employment led to an error in allocating the maximum compensation instead of a rationalized award. Having served under 3 years, a compensation of 3 months' gross wage of ksh.35 221 x 3 total Ksh.105 and 663 is justified.
- 50 The appeal is partially successful on costs. Each party is to bear its costs for the appeal and for the trial court costs as awarded.
- 51 Accordingly, the judgment in Mombasa CMELR E681 of 2021 is hereby reviewed in the following terms;
- 1 Employment terminated unfairly;
 - 2 Compensation Ksh.105,663;
 - 3 Notice pay Ksh.35,221.05;
 - 4 Underpayments Ksh.410,968.35;
 - 5 12 days worked in April 2021 Ksh. 14,088.40
 - 6 Service pay Ksh.35,221;
 7. Each party is to bear its costs of appeal, and lower court, costs as awarded.

DELIVERED IN OPEN COURT AT MOMBASA THIS 18TH DAY OF DECEMBER 2024.

M. MBARŪ

JUDGE

In the presence of:

Court Assistant: Japhet

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