



**Omondi v Colnet Limited (Appeal E052 of 2024)**  
**[2024] KEELRC 13560 (KLR) (18 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13560 (KLR)

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**  
**APPEAL E052 OF 2024**  
**M MBARÚ, J**  
**DECEMBER 18, 2024**

**BETWEEN**

**ZACHARY ODUOR OMONDI ..... APPELLANT**

**AND**

**COLNET LIMITED ..... RESPONDENT**

*(Being an appeal from the judgment of D.O. Mbeja delivered  
on 29 February 2024 in Mombasa CMELRC No.E705 of 2022)*

**JUDGMENT**

1. Following the judgment in Mombasa CMELRC No.E705 of 2022, the appellant was aggrieved and filed this appeal. He seeks to set aside the judgment and allow his claim with costs.
2. The appellant had filed a Memorandum of Claim on 22 December 2022 before the trial court on the basis that he was employed as a cleaner by the respondent on 1 March 2022. He worked on probation for 3 months and was then granted a contract dated 1 July 2022 that was to end on 31 March 2023. His duties were to provide cleaning services at Soweto Estate near *Jomo Kenyatta Airport in Mombasa* at a wage of Ksh.11, 300 per month against the contract sum of Ksh.13, 000. He worked until 14 November 2022, when his employment was unfairly terminated. He claimed that on 11 November 2022, the respondent's human resources manager sent a letter to show cause for alleged disrespect to the supervisor. On 14 November 2022, the appellant was served with a warning letter and a transfer letter dated 11 November 2022 to Nairobi since his duties at Soweto Estate in Mombasa were no longer needed. According to the letter, the appellant was supposed to report to Karen-Hub in Nairobi on 16 November 2022. He protested the short notice and requested to be facilitated with bus fare and accommodation to travel to Nairobi, but the respondent declined, and when he could not report to the new station, through a notice dated 16 November 2022, the respondent directed the appellant to report to Nairobi to collect his terminal dues. This resulted in unfair termination of employment without any good cause, and the appellant claimed the following dues;



1. Notice pay Ksh.11,300;
  2. House allowances for 9 months at 15% Ksh.15,255;
  3. Unpaid salary for November 2022 Ksh.11,300;
  4. Unpaid holidays of 4 days Ksh.1,508;
  5. Underpayments for 9 months Ksh.35,114.85;
  6. Unremitted NHIF for 9 months Ksh.4,500;
  7. Unpaid leave days Ksh.11,300;
  8. Payment for the remainder of the term contract of 5 months Ksh.65,000;
  9. 12 months compensation Ksh.135,600;
  10. Costs of the suit.
3. The respondent, in their capacity as the appellant's employer, admitted that the appellant was employed as a cleaner from 1 April 2022 until 14 November 2022, when his employment was terminated because he failed to report to work as directed by his supervisor. The respondent asserts that there was a lawful cause of absconding duty and refusal to report to work as directed. The claims made by the appellant are not justified and should be dismissed with costs.
  4. The trial court heard the parties and delivered judgment on 29 February 2024 and held that the reasons for termination of employment were valid and credible. There was sufficient cause to demonstrate that the appellant absconded duty, and under Section 41 of the Employment Act, the due process was followed. The claim was dismissed with costs.
  5. Aggrieved by the trial court's decision, the appellant filed this appeal on eight grounds. The appellant contends that the trial court erred in law and fact by finding that the respondent was justified in granting the appellant less than 2 days to relocate from his assignment in Mombasa to Nairobi. The appellant argues that the two days for transfer needed to be increased, and the respondent needed to facilitate the appellant with fare accommodation. The appellant also challenges the finding that he absconded duty.
  6. The trial court failed to assess the claims made by the appellant on merit, regardless of the reasons leading to the termination of employment. Under Section 47(5) of the Employment Act, the appellant discharged his burden of proof that there was an unfair termination of employment, and the respondent failed to justify the reasons leading to the termination of employment. The trial court, hence, was unable to find that the respondent violated the provisions of Sections 43, 44 and 45 of the Employment Act that terminal dues were payable under section 49 of the Act. The appellant argues that the appeal should be allowed.
  7. Both parties attended and agreed to address the appeal through written submissions.
  8. The appellant submitted that on 14 November 2022, the respondent issued him with a transfer notice from Mombasa to Nairobi with effect from 16 November 2022. The two days were insufficient for him to relocate with bus fare and accommodation facilitation. He engaged his supervisor to no avail. He could not report to the new station, and efforts to make his case that the notice of 2 days was too short were not addressed. He was directed to collect his terminal dues in Nairobi and worked until 16 November 2022 without being paid his terminal dues.



9. The appellant submitted that the trial court failed to find that his employment was unfairly terminated, his contract ended before the due date, and his claims should have been assessed on merit. In the case of *Henry Ochndo v NGO Coordination Board* Petition No.41 of 2015, the court held that before a transfer from one station to the next, the employee is entitled to sufficient notice. This is to allow the employee to organize family, accommodation and travel. In this case, the directions that the appellant should move to Nairobi within 2 days were insufficient and resulted in unfair termination of employment. The transfer from one station to the next was arbitrary and resulted in unfair conditions for the appellant, an unfair labour practice.
10. The appellant submitted that he discharged his burden under Section 47(5) of the Employment Act and demonstrated that his employment was unfairly terminated. In the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* [2021] eKLR, the court held that upon a claim that there was unfair termination of employment, the employer is required to justify the reasons and grounds leading to termination. The allegations that the appellant deserted duty were without proof, and the remedies sought should be issued.
11. The wage paid was without the benefit of a house allowance for 9 months. The salary for days worked in November 2022 still needs to be paid. The appellant worked for four public holidays without pay together with underpayment of wages where the contract required a salary of Ksh.13, 572.90, but the appellant was only paid Ksh. 13,300. There were no remittances to the NHIF. Service pay is due, leave days are not taken, and these dues should have been assessed and paid for the remainder of the contract term. Upon unfair termination of employment, the appellant is entitled to compensation with costs.
12. The respondent submitted that employment was terminated for valid and justified reasons, such as the appellant refusing to relocate as required, absconding duties, and the dismissal being lawful. Under Section 45 of the Employment Act, the employer is justified in terminating employment where there are genuine reasons that are valid and fair. The appellant failed to discharge his burden of proof under Section 47(5) of the Employment Act, hence placing no responsibility on the respondent to justify the reason for termination of employment.
13. There is no proof that a notice terminating employment was issued.
14. The appellant was required to show cause through a warning letter dated 11 November 2022. The appellant accepted the warning, and on the show cause notice, he asked for a second chance and promised to reform his conduct. He then declined to take the transfer as directed. Such was absconding duty without good cause.
15. Under his employment, the appellant knew he would be required to work anywhere within the country. He notes that he should have been consulted before the transfer, but the respondent made a strategic business decision and had the prerogative to transfer its employees. Under clause 5(b) of the employment contract, the appellant was entitled to reimbursement of all his expenses while performing his duties. He never applied for facilitation, as alleged. By email dated 16 November 2022, the appellant was directed to report to Nairobi on 21 November 2022, but instead, he sent a letter dated 8 December 2022 asking for payment of his terminal dues. He demanded that his employment be terminated on 16 November 2022, which was incorrect. The respondent was willing to have him report to Nairobi by 21 November 2022.
16. The trial court assessed the claims made and correctly dismissed the claim.
17. On the terminal dues, no compensation or notice pay is due if the employee opts to terminate his employment.



18. The wage paid included a house allowance per clause 2(b) of the contract. The appellant worked until 14 November 2022 and cannot justify his claim for wages for November 2022. In his letter dated 8 December 2022, the appellant admitted that he only worked for 14 days in November 2022. His last day at work was 12 November 2022.
19. The claim for work during public holidays is not substantiated. Claims for unremitted NHIF are not due to the employee, and service pay for 9 months is not justified.
20. The appellant frustrated the term contract when he failed to report as directed by the respondent. He cannot claim for the unspent term of the contract, and there is no evidence that he offered any services to the respondent after 12 November 2022. The respondent relied on the cases of Godfrey Oduoy Odongo v Mars Security Guards Limited Cause 2203 of 2017 and Gedia Adventist Academy & another v Olga Apondi Okongo Appeal E004 of 2020.

### **Determination**

21. This is a first appeal. The court is required to review, reevaluate, and reassess the Record of Appeal and make its conclusion. However, keep in mind that the trial court had the opportunity to hear the witnesses.
22. Through a contract dated 1 July 2022, the respondent employed the appellant as a cleaner at Soweto Estate as his work location. The wage was agreed at Ksh.13, 500 consolidated. Clause (d) of the contract placed the appellant on 6 months' probation.
23. Through notice dated 11 November 2022, the respondent indicated that the appellant was reporting late for work, leaving early before the agreed time, and disrespecting his supervisor.
24. The respondent transferred the appellant from Soweto Estate to HUB Karen, effective 16 November 2022, through a notice dated 11 November 2022.
25. Through email dated 11 November 2022, the appellant acknowledged receipt of these notices and pleaded for another chance. On the transfer, he noted that he was in Mombasa and required bus fare.
26. The appellant could not report to the Nairobi office from Mombasa within the time required.
27. Whereas the employer can reorganize its business accordingly, where an employee's work location is stated, a transfer to another location should be done within reasonable time and notice. In the case of Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others [2014] KEELRC 754 (KLR), the court held that the employee was entitled to reasonable notice, taking into account she was deployed in a foreign country and a time of 3 months to relocate back home was sufficient notice.
28. In this case, a period of 14 days would be reasonable. However, the requirement to move from Mombasa to Nairobi through a notice dated 11 November 2022 by 16 November 2022 was too short to allow the appellant to organise his affairs within the month and relocate to Nairobi. His letter of employment was being changed fundamentally with regard to the work location. Reasonable notice was necessary.
29. The respondent's case is that the appellant absconded duty and failed to report to the office where he was transferred. He frustrated his employment by failing to report and demanding to be paid his terminal dues on 8 December 2022. The respondent further called evidence to the effect that they allowed the appellant to report to Nairobi by 21 November 2022.
30. Page 27 of the Record of Appeal is a record filed by the appellant. He received an email from the human resources office indicating that there were discussions after he requested more time to report to the



Nairobi office. The respondent agreed that you are required to be in the office on Monday, 21st, 2022, at 9 a.m. Our offices are in the Industrial Area, Enterprise Center (Addis Ababa Road), first floor.

31. In reply, the appellant requested to be paid his terminal dues.
32. The respondent did not close the employment relationship on these events. Where the appellant failed or refused to report to the Nairobi office upon his demand for payment of terminal dues, the basis should have been notice terminating employment. The respondent, as the employer, could only bring closure to the employment relationship through such notice.
33. Without this notice, the claim that there was an unfair termination of employment stands correct.
34. The appellant is entitled to notice pay, compensation and an assessment of his terminal dues.
35. Under the employment contract, the parties agreed to a consolidated wage of Ksh. 13,500 per month.
36. Under the Wage Orders applicable from July 2022, a cleaner in Mombasa earned a minimum wage of Ksh.15, 201.65. An agreement is invalid if the wage paid is below the minimum gazette by the Minister. On the basic wage, a 15% house allowance is Ksh.2, 281, and the gross wage is Ksh.17, 482.20.
37. Notice pay is due at Ksh.17, 482.
38. The wage paid is less by Ksh.3, 983 per month. From July 2022 to October 2022, the 4 months underpayment of wage plus house allowance is Ksh.15, 929.
39. The appellant was last at work on 12 November 2022. He has not offered any services to the respondent since then. His wages are due at Ksh. 6, 992.80 for the 12 days.
40. For the unfair termination of employment, the trial court failed to take into account the circumstances of the matter and the fact that whatever reasons justified the termination of employment, the terminal dues should have been assessed on the merits. In this case, for the 4 months of employment, the appellant had a warning notice over his conduct. He failed to address his transfer diligently and opted to be paid his terminal dues. To award compensation would be to reward misconduct; in this regard, compensation is at zero (0) amount.
41. On the claim for NHIF unremitted due to 9 months, these are statutory payments not to the employee but to the statutory body. The claim for service pay was not part of the claims before the trial court, but in any event, such is due for every full year worked and is not prorated.
42. On the claim for work during public holidays, the days worked are not particularized. Each public holiday is gazette by the Minister. If any work, it would be easy to identify and set out a schedule to allow the employer to respond accordingly.
43. On the claims for the unspent contract term ending 31 March 2023, the appellant asked to be paid his terminal dues on 8 December 2022. He should have offered his labours to the respondent before 12 November 2022, as addressed above. The claim for the unspent contract term is not justified, as held in the case of *SGA Security Limited v Okuku & another* [2023] KEELRC 1716 (KLR) and *D K Njagi Marete v Teachers Service Commission* [2020] eKLR, the court held that the award of future earnings where the employee has not offered his labours to the given employer is not justified.
44. For the appeal, the same is partially successful. The appellant is entitled to 50% of his costs for the appeal.
45. Accordingly, judgment in Mombasa CMELRC E705 of 2022 is hereby set aside. Judgment is entered for the appellant against the respondent in the following terms;



1. Employment terminated unfairly;

GRAPEN Notice pay Ksh.17,482.20;

2.  
3. Underpayments ksh.15,929;

4. 12 days worked ksh.6,992.80;

5. Compensation zero(0);

6. 50% costs of the appeal.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 18<sup>TH</sup> DAY OF DECEMBER 2024.**

**M. MBARŪ**

**JUDGE**

In the presence of:

Court Assistant: Japhet

..... and .....

